

EXHIBIT “I”

John C. McCullough

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2 Pages: 1-128
3 Exhibits: 48-69

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CASAS, BENJAMIN & WHITE, LLC

Plaintiff,

v. Case No.: 04-CV-1233-MEL

THE POINTE GROUP, INC., a

Massachusetts corporation d/b/a The Pointe

Group Healthcare and Senior Living, GERALD S. FREID,

BARRY, FREID, and KEY CORPORATE CAPITAL, INC.,

Defendants.

DEPOSITION OF JOHN C. McCULLOUGH

May 19, 2005

9:24 a.m.

Conn Kavanaugh Rosenthal Peisch & Ford, LLP

Ten Post Office Square

Boston, Massachusetts 02109

24 Reporter: Carol A. Pagliaro, CSR/RPR/RMR

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 21 The Pointe Groupe, Inc., Gerald S. Freid,
 22 and Barry Freid
 23
 24

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1 correct?		1 finances, financing of projects, health care and	
2 A. Yes.		2 residential.	
3 Q. Have you ever sat in on deposition?		3 Q. And has the concentration of your practice	
4 A. Yes.		4 changed in the last 5 years?	
5 Q. So you are generally aware of the rules, but		5 A. No.	
6 I'll just tell you a few that sometimes it's hard		6 Q. Are you represented at today's deposition?	
7 for people who are actually giving depositions to		7 A. Yes.	
8 remember. Most important is you need to let me		8 Q. Are you represented by Attorney Gordon?	
9 finish my question before you start answering, even		9 A. Yes.	
10 though, like most attorneys, you are going to think		10 Q. When did that representation begin?	
11 you know what my question is, so the court reporter		11 A. When the suit started, I assume, or when I	
12 can take down my question and your answer without us		12 was noticed to the deposition, I suppose.	
13 talking over one another.		13 Q. When did you first become aware that Mr.	
14 If you don't understand a question I'm		14 Gordon was going to be representing you at the	
15 asking you, please let me know, and I'll try too		15 deposition?	
16 rephrase it.		16 A. When I got notice of the deposition.	
17 If you need to take a break, let me		17 Q. And that's the subpoena you were served	
18 know. We can do that as long as it's not in the		18 with?	
19 middle of a pending question.		19 A. Yes.	
20 And that's about it.		20 (Document marked as Exhibit 48	
21 Are you taking any medications today		21 for identification.)	
22 that would affect your ability to answer my		22 Q. I'm showing you what the court reporter has	
23 questions?		23 marked as Exhibit 48. Do you recognize that to be	
24 A. No.		24 the subpoena that was served on you for your	
	Page 7		Page 9
1 Q. I'm not going to go through a huge litany,		1 deposition?	
2 but could you just briefly tell me your educational		2 A. Looks like it.	
3 background and where you have worked in the last 20		3 Q. If you could turn to the schedule that's	
4 year?		4 attached. Were you served with this deposition	
5 A. I went to law school.		5 subpoena by mail at your office?	
6 Q. Where did you go to law school?		6 A. I think that's correct.	
7 A. BC Law.		7 Q. When you were served with the subpoena did	
8 Q. When did you graduate?		8 you undertake a review of these requests to see if	
9 A. 1966.		9 you had responsive documents?	
10 Q. And where have you worked during the past		10 A. I read the subpoena, spoke with Steve, and	
11 ten years.		11 looked at the requests, the schedule, yes.	
12 A. McCullough, Stievater & Polvere, 121 Main		12 Q. And you looked at the requests around	
13 Street, Charlestown.		13 the time you received the subpoena?	
14 Q. And that's a firm you founded?		14 A. Right.	
15 A. Yes.		15 Q. Did you determine whether you had documents	
16 Q. What year did you found the firm?		16 that were responsive to the request?	
17 A. 1972.		17 A. A number of these documents we had, yes.	
18 Q. And you have worked there ever since?		18 Q. And were these documents, at the time you	
19 A. Yes.		19 received the subpoena and read the schedule, were	
20 Q. Can you just describe for me generally your		20 the documents in your office?	
21 areas of practice?		21 A. I would say these documents were both in our	
22 A. Currently the areas of practice are project		22 client's office, my office, and I don't recall if	
23 developments, affordable housing, extensive nursing		23 Steve had these documents at the time also, Steve	
24 home representation, management, sales, HUD closing,		24 Gordon.	

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1 Q. So let's just look at No. 1, All documents
 2 relating to or reflecting disbursements made at the
 3 closing on the sale of the combined operations, or
 4 from the date of the closing to the date of your
 5 response to this request, including any disbursement
 6 of the buyer's deposit or any escrow funds. Did you
 7 review your files to see if you had any documents
 8 relating to that request?

9 A. Yes.

10 Q. What did you determine?

11 A. That those documents were in the closing
 12 binders.

13 Q. And the documents that were in the closing
 14 binders, how many binders were there?

15 A. I think there were 3. They were prepared by
 16 Goodwin Procter.

17 Q. Those closing binders, just to make sure I
 18 understand your response, would those closing
 19 binders include documents that were created or
 20 generated after the closing?

21 A. I don't believe so.

22 Q. Just let me repeat my question then. As to
 23 the second part of that request which asks for
 24 documents relating to disbursements made from the

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1 to post-closing disbursements from the escrow funds?
 2 A. In that context, post-closing disbursements,
 3 when you say relate, we have received a claim letter
 4 recently for disbursements of the escrow funds; are
 5 you referring to that?

6 Q. Well, that certainly would relate to
 7 disbursement, any disbursements from the escrow
 8 fund.

9 A. Well, there hasn't been a disbursement,
 10 but... We are in the process of preparing a
 11 response to that request.

12 Q. But let me just ask you about that claim
 13 letter. Who was the claim received from?

14 A. Epoch.

15 Q. And I don't need to know the details, but
 16 just generally in that letter Epoch is claiming some
 17 entitlement to some funds that were in an escrow
 18 account at some point?

19 A. That's correct.

20 Q. Do you recall the different escrow funds
 21 that were set up, whether they were funds that were
 22 escrowed at Mellon or Fidelity?

23 A. The Fidelity escrow was the deposit escrow;
 24 the Mellon escrow is the closing escrows.

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1 date of the closing to the date of your response,
 2 including any disbursements of the buyer's deposit
 3 or any escrowed funds, did you review files to
 4 determine if you had any documents responsive to
 5 that request?

6 A. There were no documents in our possession
 7 after the close to buyers that related to
 8 disbursements.

9 Q. You said the 3 closing binders were prepared
 10 by Goodwin Procter?

11 A. Right.

12 Q. After the date of the closing did you ever
 13 review those binders to see if they were complete?

14 A. I don't recall that I reviewed them to see
 15 if they were complete. It was a number of weeks
 16 after the closing that we received them, so...

17 Q. And do you know whether those closing
 18 binders were given to Atty. Gordon so that he could
 19 make them available for review in response to a
 20 document request served on The Pointe Group?

21 A. I believe that's correct.

22 Q. And it's your testimony that you, aside from
 23 those closing binders, you don't have any documents
 24 in your possession, custody, or control that relate

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1 Q. That may answer the question in your mind,
 2 but not mine --

3 A. Sorry.

4 Q. -- not being a transactional lawyer, so I
 5 think what you are saying is that the Fidelity was
 6 the deposit escrow --

7 A. That's correct.

8 Q. -- and the Mellon was the -- what was the
 9 word you used to describe it?

10 A. Closing escrow.

11 Q. -- closing escrow. So the Epoch letter, or
 12 the claim letter that you received from Epoch, they
 13 are claiming an entitlement to funds that were in
 14 which escrow?

15 A. The Mellon escrow.

16 Q. And aside from that claim letter you don't
 17 recall any documents having been in your possession
 18 from the date of closing to today that related to
 19 disbursements that were made from the Fidelity fund,
 20 the deposit fund?

21 A. Nothing else.

22 Q. Through other productions in the case I've
 23 also gotten, and we will go through some of those
 24 today, some draft closing statements that were

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<p style="text-align: right;">Page 14</p> <p>1 prepared in the days leading up to the September 30 2 closing and also some that were prepared, it looks 3 like, on the day of the closing. Did you review 4 your file to see if you had any drafts of closing 5 statements in your files?</p> <p>6 A. I didn't find any drafts.</p> <p>7 Q. And before the deposition started you had 8 handed me a document that you -- a printout of an 9 e-mail that your counsel represented you found when 10 you searched your e-mail. I just had a couple of 11 questions about your e-mail system, if you don't 12 mind. In the days leading up to the closing I 13 presume that you received e-mails pertaining to the 14 closing; is that correct?</p> <p>15 A. I would assume that some went back and 16 forth.</p> <p>17 Q. And what is your practice with respect to 18 e-mails that you receive in terms of whether you 19 delete them, whether you store them in a folder, 20 whether you typically print them out and put them in 21 a file?</p> <p>22 A. It depends on the e-mail transaction. 23 E-mails that are just exchanging documents, or 24 something of that nature, we don't save. I purge my</p>	<p style="text-align: right;">Page 16</p> <p>1 Q. But did you review any files that you 2 maintained?</p> <p>3 A. I looked on my e-mails, and as I say, I had 4 purged my e-mails.</p> <p>5 Q. But aside from looking on your computer, did 6 you also look through whatever files you had 7 pertaining to the transaction to see if you had 8 produced or had any e-mail messages pertaining to 9 the transaction?</p> <p>10 A. I had no e-mails that were printed out.</p> <p>11 Q. My question is are you answering that from 12 memory or after you received the subpoena did you 13 actually look through your files to see if you had 14 any e-mails?</p> <p>15 A. I'm telling you I had no e-mails that were 16 printed out.</p> <p>17 Q. If I could ask you to look at Request No. 18 12, and this request, I'm not going to read the 19 whole request into the record, because, obviously, 20 you can read it yourself, but in substance asks 21 for documents relating to, or evidencing, loans made 22 by Key Bank for the various facilities that we have 23 been calling the combined operations, and my 24 question is whether you reviewed your files to</p>
<p style="text-align: right;">Page 15</p> <p>1 e-mail every 3 months, every quarter, and this 2 particular e-mail that I delivered to you this 3 morning was I asked my associate to look in her 4 files, and she found that particular e-mail.</p> <p>5 Q. Is that Mary Cole?</p> <p>6 A. Mary Cole, yes. She is a project manager. 7 She was the project manager on this file.</p> <p>8 Q. With respect to this particular transaction, 9 the sale of what we have been calling the combined 10 operations as it's defined in that subpoena, do you 11 recall receiving any e-mails that, rather than 12 deleting, you put into a folder or otherwise saved?</p> <p>13 A. I did not.</p> <p>14 Q. Do you recall receiving any e-mails 15 pertaining to this transaction that you printed out 16 rather than deleting?</p> <p>17 A. I don't recall that, no.</p> <p>18 Q. In preparation for coming here today, in 19 addition to searching e-mail on your computer, did 20 you also go through any correspondence files you 21 maintained to see if you had any responsive e-mail 22 messages?</p> <p>23 A. I did not have any responsive e-mail 24 messages.</p>	<p style="text-align: right;">Page 17</p> <p>1 determine whether you had any documents responsive 2 to that request.</p> <p>3 A. I did have copies of the workout agreements 4 with Key Bank, it was my understanding that they 5 have been produced, which would include Hammond 6 Point, Boylston Place, and Cranberry Point.</p> <p>7 Q. Aside from the workout agreements did you 8 have copies of documents relating to the loans that 9 Key Bank made to those entities; for example, did 10 you have mortgages --</p> <p>11 A. We would have had copies of mortgages, 12 because we had to secure releases of those mortgages 13 from Key Bank. When I say copies, we would have had 14 copies, probably copies, but we also had -- you 15 know, we would go online and check the titles to 16 make sure we were getting all the discharges and 17 releases from Key Bank.</p> <p>18 Q. During the course of this case we have heard 19 some testimony regarding some accounts, and, in 20 particular, Mrs. Freid testified that she had an 21 account at UBS PaineWebber that she didn't have 22 access to before the closing and that she did have 23 access to after the closing, and it was her 24 understanding, via her testimony, that Key Bank has</p>

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<p style="text-align: right;">Page 18</p> <p>1 some sort of a lien on that account, and I'm 2 wondering if you had any documents that would be 3 responsive to this request that related to that 4 account and the discharge or release of whatever 5 lien Key had on that account.</p> <p>6 A. We would have no documents related to what 7 was in the account. We did have knowledge that 8 there was a lien on assets of Mrs. Freid. It's my 9 understanding at the closing that we secured 10 releases of all liens that Key had on all 11 properties, the facilities, and I believe we also -- 12 the release we obtained from the bank included a 13 release of their claim against Mrs. Freid.</p> <p>14 Q. And in order to insure that all of these 15 liens were released, do you recall whether you 16 had -- your office had copies of documents that 17 demonstrated or showed what the liens were?</p> <p>18 A. No, I can't recall at the instant. I know 19 that the discharge from Key Bank was comprehensive 20 as to all claims.</p> <p>21 Q. When did you first begin to represent any 22 member of the Freid family?</p> <p>23 ATTY. GORDON: You talking about as 24 individuals or any entity they were involved with?</p>	<p style="text-align: right;">Page 20</p> <p>1 that we have been talking about today? 2 A. We did work for these entities at that time, 3 but the financing of these entities was not provided 4 by this office. We didn't work on the financing 5 with Key Bank.</p> <p>6 Q. Do you know which law firm did? 7 A. No, I don't.</p> <p>8 Q. During the last 5 years has your office 9 provided any legal services to Key Bank?</p> <p>10 A. No.</p> <p>11 Q. And have you provided legal services to 12 other entities, other than the entities affiliated 13 with the Freids, on transactions in which Key Bank 14 was lending money?</p> <p>15 A. Yes.</p> <p>16 Q. And on those other transactions do you 17 recall what contact people at Key Bank you worked 18 with?</p> <p>19 A. I worked with Key Bank in Columbus Ohio. 20 (Document marked as Exhibit 49 21 for identification.)</p> <p>22 Q. Mr. McCullough, I'm handing you what the 23 court reporter has marked as Exhibit 49, a December 24 23, 2003 letter from Madeline Kauffman to you, and</p>
<p style="text-align: right;">Page 19</p> <p>1 ATTY. HIGGINS: Well, he can answer it 2 to the best of his ability. If he doesn't 3 understand it he can let me know.</p> <p>4 A. I don't think I have ever represented any of 5 the Freids individually, only in connection with 6 their interests in these entities, and your question 7 is how long have I done that? I'd say 15 or 20 8 years, I suppose. I was trying to think back as to 9 the first time Bill Freid became involved in these 10 projects. It had to be in the eighties, I would 11 think, sometime.</p> <p>12 Q. Do you recall which particular project it 13 was that Mr. Freid first became involved with?</p> <p>14 A. He was involved as an investor in other 15 projects that we were working on. That was in the 16 late seventies and early eighties.</p> <p>17 Q. And were you -- did you represent -- let me 18 ask this, During the time that you have been 19 providing legal services to entities that Mr. Freid 20 either had an investment in or some other interest 21 in -- strike that.</p> <p>22 Did you represent the entities that we 23 have identified as the combined operations at the 24 time that Key Bank made the loans to these entities</p>	<p style="text-align: right;">Page 21</p> <p>1 you see this references a facility that is not one 2 of the ones we have been considering part of the 3 combined operations, the South Point property and 4 facility. My first question is, Do you remember 5 ever working with Ms. Kauffman before this, December 6 of 2003?</p> <p>7 A. Yes.</p> <p>8 Q. When was that?</p> <p>9 A. That was on the refinancing of South Point.</p> <p>10 Q. So is that what we are talking about here, 11 the re: here?</p> <p>12 A. Yes.</p> <p>13 Q. When did you first start working on that?</p> <p>14 A. Well, it was a HUD refinance, so it would 15 have been probably 6, 7 months prior to this letter.</p> <p>16 Q. Before working on the South Point refinance, 17 had you ever worked with Ms. Kauffman before?</p> <p>18 A. I don't believe so.</p> <p>19 Q. This letter describes a payoff that is 20 anticipated to be made to Key; do you know whether 21 that actually happened?</p> <p>22 A. Yes.</p> <p>23 Q. At the time of this December 23 letter did 24 you know that individuals at The Pointe Group were</p>

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<p style="text-align: right;">Page 22</p> <p>1 attempting to work something out with Key with 2 respect to Key's liens on the other properties, the 3 ones we have been defining as the combined 4 operations?</p> <p>5 A. Yes.</p> <p>6 Q. Did you have any role in those negotiations?</p> <p>7 A. With Key Bank?</p> <p>8 Q. Yes.</p> <p>9 A. No, other than closing on South Point.</p> <p>10 Q. When did you first become involved in -- 11 strike that. During this time period December of 12 2003 did you ever learn from anyone affiliated with 13 The Pointe Group that they had retained the services 14 of my client Casas, Benjamin & White?</p> <p>15 A. Did I learn at sometime?</p> <p>16 Q. No, around the time of this letter in 17 December of 2003 did you know that The Pointe Group 18 had retained Casas, Benjamin & White?</p> <p>19 A. I'm note sure in the context of time whether 20 Casas, Benjamin was involved at this time. I don't 21 recall.</p> <p>22 Q. Did you ever review any sort of an 23 engagement letter between The Pointe Group and 24 Casas, Benjamin & White?</p>	<p style="text-align: right;">Page 24</p> <p>1 A. 2004?</p> <p>2 Q. Correct.</p> <p>3 A. Did I have any communication with Casas, 4 Benjamin & White?</p> <p>5 Q. Correct.</p> <p>6 A. I recall 2 telephone conferences in which 7 Casas, Benjamin & White participated, overall 8 conferences on the transaction, early in the 9 transaction.</p> <p>10 Q. And you were also a participant in those 11 conference calls?</p> <p>12 A. Yes.</p> <p>13 Q. Other than those 2 conference calls did you 14 ever speak with anyone at Casas, Benjamin & White?</p> <p>15 A. Yes.</p> <p>16 Q. When was that?</p> <p>17 A. I spoke with a representative of Casas, 18 Benjamin & White at a meeting at Goodwin Procter.</p> <p>19 Q. Was that meeting in July of 2004?</p> <p>20 A. It was a meeting at which Larry Gerber made 21 a presentation as to why he had to reduce the 22 purchase price.</p> <p>23 Q. And other than that meeting and the 2 24 conference calls where you were all participants, do</p>
<p style="text-align: right;">Page 23</p> <p>1 A. I did see an engagement letter, yes.</p> <p>2 Q. Did you see that in the context of this 3 case, the one you are here on today, or did you see 4 it before that?</p> <p>5 A. I don't recall the date of that engagement 6 letter.</p> <p>7 Q. I'm showing you what was marked previously 8 as Deposition Exhibit 4, which I'll represent to you 9 is the engagement letter which has the date on the 10 first page of September 4, 2003. Did you see this 11 engagement letter on or about the date that it was 12 executed?</p> <p>13 A. I would say I saw it sometime after that. I 14 have a copy of it in my file.</p> <p>15 Q. Were you involved at all in any negotiations 16 regarding the terms of the engagement letter?</p> <p>17 A. No.</p> <p>18 Q. Do you recall, from the time that engagement 19 letter was signed September 4 of 2003, to the date 20 of the closing, did you ever have any communications 21 directly with anyone at Casas, Benjamin & White?</p> <p>22 A. Which closing are you speaking of, the South 23 Point?</p> <p>24 Q. I'm sorry, the September 30 closing.</p>	<p style="text-align: right;">Page 25</p> <p>1 you recall speaking with anyone at Casas, Benjamin & 2 White?</p> <p>3 A. No, I don't.</p> <p>4 Q. Other than the transaction that ultimately 5 closed in September of 2004 have you ever worked 6 with anyone at Casas, Benjamin & White?</p> <p>7 A. No.</p> <p>8 Q. Before the first time you saw that 9 engagement letter that was marked as Exhibit 4 had 10 you ever heard of Casas, Benjamin & White?</p> <p>11 A. Before I saw the engagement letter?</p> <p>12 Q. Correct.</p> <p>13 A. I think in the workout agreements with Key 14 Bank there was a reference to, or in some 15 correspondence I saw I saw the name of Casas, 16 Benjamin & White, but I had never heard of them 17 before that.</p> <p>18 Q. Other than this particular transaction you 19 had never heard of Casas, Benjamin & White?</p> <p>20 A. That's correct. Subsequent to the 21 transaction I have.</p> <p>22 Q. Subsequent to the transaction have you been 23 involved in deals or transactions in which Casas, 24 Benjamin & White also was involved?</p>

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<p style="text-align: right;">Page 26</p> <p>1 A. No.</p> <p>2 Q. So when you say subsequent to the 3 transaction are you talking about this litigation?</p> <p>4 A. No, I read in the newspaper where they sold 5 an interest in Casas, Benjamin & White for a 6 substantial amount of money.</p> <p>7 Q. Do you recall approximately when you were 8 first asked to get involved in the transaction that 9 ultimately closed on September 30 of 2004?</p> <p>10 A. I think the first time I was involved was 11 when we saw a draft of a Letter of Intent, I think 12 it was, from the Epoch Group.</p> <p>13 Q. From the date on which you saw that draft 14 Letter of Intent, to the date of the closing on 15 September 30 of 2004, can you tell me what entities 16 did you represent, your office represent?</p> <p>17 A. The selling entities, the Cranberry Point 18 Partnership, Cranberry Point, Inc., and Hammond 19 Point Realty -- is it Realty? I can't remember the 20 exact name of the real estate entity -- and then 21 Boylston Place.</p> <p>22 Q. Did you represent The Pointe Group, Inc.?</p> <p>23 A. The Pointe Group wasn't a participant in the 24 actual transaction; they were basically a management</p>	<p style="text-align: right;">Page 28</p> <p>1 you were involved in the transaction leading up to 2 the September 30, 2004 closing, what was your 3 understanding as to what individuals had ownership 4 interests in the selling entities?</p> <p>5 A. Those individuals that had ownership were 6 those that were set forth in the public records.</p> <p>7 Q. What public records are you referring to?</p> <p>8 A. Corporations Department. Let's see. There 9 would have been statements filed with the Secretary 10 of State's Office, so that would have been Mark 11 Tobin and Georgia Freid, I think. I think that's 12 probably it.</p> <p>13 Q. These public documents that you were 14 referring to, have you actually seen them?</p> <p>15 A. Of course partnership documents are not 16 recorded. Secretary of State filings which show the 17 officers and directors. You are talking about 18 ownership interest, who would own the shares? That 19 wouldn't be a public record, I guess. My 20 understanding was Mark and Georgia.</p> <p>21 Q. And during the time period that we are 22 talking about here, let's just see, January 1 of 23 2004 through the date of the closing, were those 24 documents in your office's possession, custody, or</p>
<p style="text-align: right;">Page 27</p> <p>1 group.</p> <p>2 Q. Has your office rendered legal services to 3 The Pointe Group, Inc., the management?</p> <p>4 A. From time to time.</p> <p>5 Q. You didn't consider that entity to be your 6 firm's client with respect to this transaction?</p> <p>7 A. They weren't a seller.</p> <p>8 Q. So you didn't consider them to be your 9 client for purposes of this transaction?</p> <p>10 A. I think that would probably be correct. We 11 didn't bill them for any work done on this project, 12 as I remember.</p> <p>13 Q. And in terms of the selling entities that 14 you did represent, did you have a particular contact 15 person that if you had any questions you would 16 contact, or were there different contact people for 17 different issues?</p> <p>18 A. There were a number of contact people.</p> <p>19 Q. Who were those people?</p> <p>20 A. Frank Barker, Barry Freid, Jerry Freid, Mark 21 Tobin, some of the other staff in their office.</p> <p>22 (Document marked as Exhibit 50 23 for identification.)</p> <p>24 Q. Mr. McCullough, during the time period that</p>	<p style="text-align: right;">Page 29</p> <p>1 control?</p> <p>2 A. We would have had copies of partnership 3 documents, yes.</p> <p>4 Q. And documents that showed which individuals 5 owned shares in the entities, those documents were 6 documents that you had?</p> <p>7 A. Yes, those are also public records at Public 8 Health -- Department of Public Health I mean. 9 Sorry.</p> <p>10 Q. Are those documents still in your office?</p> <p>11 A. I would say we have copies of those 12 documents, yes. They were part of every HUD 13 closing, they were part of every transaction they 14 participated in, and they are on file in the 15 Department of Public Health.</p> <p>16 Q. Did you look for those documents in 17 responding to the subpoena that is in front of you 18 today?</p> <p>19 A. No. It's my understanding that they were 20 produced.</p> <p>21 ATTY. HIGGINS: Steve, I'm going to ask 22 that those documents be produced, because they are 23 clearly responsive to the subpoena.</p> <p>24 Q. I'm showing you what the Court Reporter has</p>

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<p style="text-align: right;">Page 30</p> <p>1 marked as Exhibit 50. Mr. McCullough, you see that 2 this e-mail which has a date at the top of June 3, 3 2004 and was directed to Madeline Kauffman from 4 Stephen Gordon, was cc'd to an e-mail address that 5 appears to be yours; is that your e-mail address? 6 A. Yes, it is. 7 Q. Do you recall receiving this e-mail from Mr. 8 Gordon that had this calculation in it with respect 9 to how CBW's commission can be, quote, revenue 10 neutral, close quotes, to Key? 11 A. Where does it say it's revenue neutral, I'm 12 sorry? 13 Q. If you read the first sentence of the 14 e-mail. 15 A. Oh, I see. Okay. Do I recall getting this? 16 Q. Yes. 17 A. I don't recall getting it, but, I mean, I 18 assume I got it. 19 Q. Do you recall in this time frame, June of 20 2004, becoming aware that CBW -- strike that. Do 21 you recall in this time frame, June of 2004, 22 communications regarding CBW's commission? 23 A. I don't understand the question. 24 Q. Whether or not you recall the specific</p>	<p style="text-align: right;">Page 32</p> <p>1 Q. And that there is set out in that paragraph 2 a formula for CBW to be compensated for those 3 services? 4 A. I see that. 5 Q. Did you ever do a calculation based on the 6 Epoch purchase price of the amount that was due to 7 CBW? 8 A. No. 9 Q. Do you recall seeing communications where 10 that calculation was made? 11 A. I don't recall seeing calculations. 12 Q. Did you have an understanding prior to the 13 closing that pursuant to the terms of this 14 engagement letter that you had read CBW was entitled 15 to be paid based on this formula for investment 16 banking services? 17 A. I had no idea how, and whether or not, CBW 18 had performed. I had no idea about that, whether 19 they would be entitled to it. 20 Q. What was the purpose of your reading the 21 engagement letter? 22 A. It was a document that came to my office, 23 and I looked at it and put it in the file. 24 Q. After the date of this e-mail that has been</p>
<p style="text-align: right;">Page 31</p> <p>1 e-mail, do you recall in this time frame, June of 2 2004, there being communications between the 3 individuals involved in the transaction about the 4 amount that was due to CBW? 5 A. No, I don't recall it. 6 Q. At any time prior to the September 30, 2004 7 closing did you have an understanding that an amount 8 would be due to CBW for the services that it had 9 provided? 10 A. My understanding was only what I had read in 11 the engagement letter. 12 Q. And do you recall -- well, let's look at the 13 engagement letter. Looking at Exhibit 4, if you 14 look at -- this actually doesn't have pages, but if 15 you look at the paragraph that begins with No. 2, 16 Fee arrangements -- 17 A. Okay. 18 Q. -- and you see that there is, first, 19 services described as restructuring services and 20 some hourly rates; do you see that? 21 A. Yes. 22 Q. Then on the next page you see that there is 23 underlined investment banking services? 24 A. Yes.</p>	<p style="text-align: right;">Page 33</p> <p>1 marked as Exhibit 50, this June 3 date, do you 2 recall -- let me ask this question first, do you 3 recall that at one point in time Epoch had offered 4 to pay \$37 million for the combined operations? 5 A. The initial purchase price? 6 Q. Yes. 7 A. I think there was an initial purchase price, 8 right. I'm sorry. Go ahead. 9 Q. Were you involved at all with negotiations 10 with Epoch in terms of Epoch's reduction of that 11 purchase price? 12 A. Well, there wasn't much negotiations. You 13 asked me was I involved in negotiations. As I 14 described to you we had a meeting at Goodwin Procter 15 at which they indicated that they would not pay the 16 \$37 million for various reasons, and, as I recall 17 that day we left the meeting, it appeared that the 18 transaction may have ended, and we then worked with 19 other counsel to see if we could get the deal back 20 on track. 21 Q. And that other counsel, was that the 22 attorneys at Goodwin, Procter & Hoar? 23 A. No, it was my understanding that Mr. Gordon 24 took the lead in that matter.</p>

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<p style="text-align: right;">Page 34</p> <p>1 Q. You previously mentioned that you recall 2 2 different conference calls that you participated in 3 and that folks from CBW also participated in?</p> <p>4 A. Yes.</p> <p>5 Q. Do you remember which individuals from CBW 6 participated in those calls?</p> <p>7 A. I believe the first call there were 2 8 individuals from CBW. I think Matt Caine is a name 9 I remember, and I can't recall the second fellow. 10 I'm sure I'd recognize the name, but I can't 11 remember it.</p> <p>12 Q. Do you recall if it was Matt Ryan?</p> <p>13 A. That doesn't ring a bell.</p> <p>14 Q. Ed Casas?</p> <p>15 A. I don't think so. It was an older fellow, 16 as I remember the tone of his voice. I never met 17 him.</p> <p>18 Q. Do you recall whether that conference call 19 preceded, or was subsequent to, the meeting at 20 Goodwin, Procter & Hoar where Epoch announced that 21 it was going to be reducing a purchase price?</p> <p>22 A. I believe it was before.</p> <p>23 Q. And do you recall the purpose or general 24 subject matter of the conference call?</p>	<p style="text-align: right;">Page 36</p> <p>1 Italian fellow. I don't recall his name. Matt 2 Caine came, this is the first time I met him, and 3 representatives from the sellers.</p> <p>4 Q. And do you remember which members of the 5 Freid family were there?</p> <p>6 A. I believe Barry, I think Gerry was there, 7 and their CFO Frank Barker, Steve Gordon, counsel.</p> <p>8 Q. Was Georgia Freid at that meeting?</p> <p>9 A. No.</p> <p>10 Q. Before you went to the meeting and Larry 11 Gerber made that presentation, what did you 12 understand was the purpose of the meeting?</p> <p>13 A. They were discussing the completion of due 14 diligence and their findings.</p> <p>15 Q. And you recall that Mr. Gerber made a 16 presentation?</p> <p>17 A. Yes, slides, pointers, quite extensive.</p> <p>18 Q. At the end of that presentation did Mr. 19 Gerber make some sort of an announcement about the 20 purchase price?</p> <p>21 A. Oh, yes.</p> <p>22 Q. What was his announcement?</p> <p>23 A. That it had to be less. I think it was 24 33,000 or something -- 33 million, I'm sorry,</p>
<p style="text-align: right;">Page 35</p> <p>1 A. I think the conference call, although they 2 were on the call, they didn't really participate in 3 the call. It was basically a discussion between 4 counsel to determine the schedules for producing 5 exhibits and due diligence on behalf of Epoch and 6 what individuals would be participating in those 7 matters.</p> <p>8 Q. Is it your recollection that at the time of 9 that first conference call it had already been 10 decided to go forward with Epoch?</p> <p>11 A. I think the letter of intent had been 12 executed. We were working on the purchase and sale 13 agreement.</p> <p>14 Q. What about the second conference call; what 15 was the purpose of it?</p> <p>16 A. It was a similar call to see what the status 17 was of exhibits and matters of that sort.</p> <p>18 Q. Who do you recall being at the meeting at 19 Goodwin, Procter & Hoar where Larry Gerber spoke?</p> <p>20 A. Epoch was represented by Deborah Paff, and 21 Beth Anderson, and I think one other Epoch 22 participant, counsel, Andy Sucoff, David Henken for 23 Epoch. I believe representatives from Key Bank came 24 down that day, Madeline Kauffman and another banker,</p>	<p style="text-align: right;">Page 37</p> <p>1 somewhere around there.</p> <p>2 Q. After Mr. Gerber made his presentation and 3 announced what Epoch was willing to pay, was there 4 then a meeting among the group there representing 5 the sellers?</p> <p>6 A. We probably talked for a moment and then we 7 left.</p> <p>8 Q. Do you recall that before the group 9 representing the sellers talked that Mr. Caine was 10 asked to leave the room?</p> <p>11 A. Well, no, I don't recall that, but I 12 remember, you know, we had a conversation.</p> <p>13 Q. You don't recall whether or not Mr. Caine 14 was there?</p> <p>15 A. He wasn't part of our conversation, no. I 16 think after the general presentation he left and the 17 folks at Key went back to Albany.</p> <p>18 Q. After Mr. Gerber's presentation did you, or 19 anyone else representing the sellers, have any 20 conversations with anyone there representing Key 21 Bank as to what was going to happen now that Epoch 22 had decided to reduce the purchase price?</p> <p>23 A. I did not have any conversation with Key 24 Bank about that matter.</p>

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<p style="text-align: right;">Page 38</p> <p>1 Q. Do you recall being there when anyone else 2 had such conversations that day? 3 A. About the matter, no, I don't. I don't 4 recall. 5 Q. It's your recollection that after Mr. 6 Gerber's presentation the Key Bank people left and 7 there was some further discussion just among the 8 folks representing the sellers? 9 A. Right. 10 Q. When you left Goodwin Procter's office that 11 day what was your understanding as to the status of 12 the transaction? 13 A. It appeared that this was going to be a bump 14 in the road. 15 Q. Was there any consensus among the group as 16 to any sort of a counter that should be presented to 17 Epoch in terms of its reduction of the purchase 18 price? 19 A. You are asking me to disclose a conversation 20 with my client? 21 Q. No, I'm not; I'm asking you whether it was 22 your understanding that there was a counteroffer 23 that was going to be conveyed from The Pointe Group 24 side to Epoch.</p>	<p style="text-align: right;">Page 40</p> <p>1 Chestnut Hill? Do you see that? 2 A. Yes. 3 Q. Do you have any knowledge about what that 4 abutter title issue was at the time of this e-mail? 5 A. Yes. 6 Q. What can you tell me about what the title 7 abutter issue was that was referenced in this 8 e-mail? 9 A. Apparently the buyers, Epoch, had obtained 10 a survey of the property at Chestnut Hill, Chestnut 11 Hill being Hammond Point and Boylston Place, and 12 concluded that there was an encroachment on a 13 portion of the property on neighboring property. 14 Q. The next sentence talks about the as-agreed 15 Cranberry, with a capital C, escrow of \$300,000 16 being increased to \$400,000; do you know -- what was 17 that -- what is the Cranberry escrow set up for? 18 A. The escrow was set up to support warranties, 19 and guaranties, and representations made in the 20 purchase and sale agreement. 21 Q. Was that escrow increased from 300,000 to 22 400,000 to account for the abutter issue? 23 A. No. 24 Q. Do you know why that escrow was increased</p>
<p style="text-align: right;">Page 39</p> <p>1 A. We were going to think about it further to 2 see what we could do. 3 Q. Do you know whether, after that meeting, 4 there was a number conveyed to Epoch in terms of 5 another proposed number between 37 million and the 6 number that Epoch was proposing? 7 A. I don't recall. I was not involved in that. 8 (Document marked as Exhibit 51 9 for identification.) 10 Q. This September 25, 2004 e-mail appears to 11 have been copied to you? 12 A. Yes. 13 Q. And you see that in the -- that the e-mail 14 is actually directed to Madeline Kauffman, Andy 15 Sucoff, and David Henken, and in that e-mail Mr. 16 Gordon begins by saying, I did not have a chance 17 after we concluded our agreement late in the day 18 yesterday to confirm it in writing. My question is, 19 Were you a participant in whatever discussions led 20 to the agreement that is referenced in this 21 September 25 e-mail? 22 A. No. 23 Q. Do you see that the e-mail in the second 24 sentence references an abutter title issue in</p>	<p style="text-align: right;">Page 41</p> <p>1 from 300- to 400,000? 2 A. Yes. 3 Q. Why was that? 4 A. There had been a recent claim notice, or a 5 notice of investigation filed by the Atty. General's 6 Office concerning Cranberry Point Nursing Home, the 7 operation of Cranberry Point Nursing Home. 8 (Document marked as Exhibit 52 9 for identification.) 10 Q. Mr. McCullough, I think you previously 11 identified Mary Cole as the -- did you call her the 12 project manager? 13 A. Yes. 14 Q. And that was for the transaction that closed 15 on September 30; is that correct? 16 A. Yes, she was working on that project, yes. 17 Q. In your office what is the role of a project 18 manager? 19 A. Her role in this particular case was to 20 compile documentation, there was an enormous amount 21 of paper in this case, and compile documentation, 22 interact with the attorneys and paralegals at 23 Goodwin Procter to exchange documents, satisfy the 24 extensive lists of exhibits in the Purchase and Sale</p>

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<p style="text-align: right;">Page 42</p> <p>1 Agreement, and to make sure that we had good records 2 of what we had delivered, and that we would do so 3 timely.</p> <p>4 Q. And is Ms. Cole an attorney?</p> <p>5 A. No.</p> <p>6 Q. What is her educational background, do you 7 know?</p> <p>8 A. I believe she is a college graduate. She is 9 the former Administrator of the Federal Court of 10 Appeals.</p> <p>11 Q. How long has she worked for your firm?</p> <p>12 A. She has worked for our firm on and off for 13 over 30 years. She hasn't worked there 30 years; 14 she has worked in Washington as a major litigation 15 project manager. She was the administrator of 16 District Attorney Ralph Martin's Office, and she has 17 come back and forth on different projects with our 18 office over the years.</p> <p>19 Q. Does she still work with your office today?</p> <p>20 A. Yes.</p> <p>21 Q. Whose handwriting is on this document, do 22 you know?</p> <p>23 A. No.</p> <p>24 Q. Do you see that this -- at the top it says</p>	<p style="text-align: right;">Page 44</p> <p>1 this document there is a logo and then some text 2 that says The Pointe Group Healthcare and Senior 3 Living?</p> <p>4 A. Mm-mm.</p> <p>5 Q. Is that a name that you are familiar with?</p> <p>6 A. I've seen it before, yes.</p> <p>7 Q. Do you have any understanding as to whether 8 that's a corporate entity?</p> <p>9 A. I think that's a d/b/a for the management 10 entity.</p> <p>11 Q. A d/b/a for The Pointe Group, Inc.?</p> <p>12 A. Yes, I believe so.</p> <p>13 Q. And Mary Cole is the person we talked about 14 before, the project manager on this project?</p> <p>15 A. That's correct.</p> <p>16 Q. And would it have been part of Ms. Cole's 17 responsibilities to gather wiring instruction for 18 the transaction?</p> <p>19 A. Well, it was her responsibility to, as I 20 say, assimilate all documentations. We had meetings 21 from time to time in our office about where 22 documents were, what we needed, and who had to get 23 what, and I assume that she just followed 24 instructions to obtain information.</p>
<p style="text-align: right;">Page 43</p> <p>1 her -- the very top message says this e-mail came to 2 John today, and then there is some initials, M A T?</p> <p>3 A. Yes.</p> <p>4 Q. Who is that?</p> <p>5 A. Mary Ann Tyler, my paralegal.</p> <p>6 Q. Was Ms. Tyler also working on this 7 transaction?</p> <p>8 A. Yes.</p> <p>9 Q. How long has she been with your firm?</p> <p>10 A. Since 1973.</p> <p>11 Q. And is she still there today?</p> <p>12 A. Yes. (Document marked as Exhibit 53 for identification.)</p> <p>13 Q. Mr. McCullough, you see that this exhibit, 14 which was marked as Exhibit 53 -- and it has 15 multiple pages, but the cover page appears to be a 16 fax transmission page from Frank Barker, correct?</p> <p>17 A. Yes.</p> <p>18 Q. And do you know what Mr. Barker's role was 19 with The Pointe Group?</p> <p>20 A. It's my understanding that he is the 21 financial officer.</p> <p>22 Q. And you see that on the left-hand side of</p>	<p style="text-align: right;">Page 45</p> <p>1 Q. And followed instructions from whom?</p> <p>2 A. Probably me. I was lead counsel on that 3 case.</p> <p>4 Q. So you see this fax, it says on it -- this 5 is in, obviously, Mr. Barker's writing -- it appears 6 to say Pointe Group wire instructions?</p> <p>7 A. I don't know that that is Mr. Barker's 8 writing.</p> <p>9 Q. You see the comments on the lower part of 10 the first page; do you understand that to refer to 11 Pointe Group wire instructions?</p> <p>12 A. Yes.</p> <p>13 Q. And these wire instructions, it looks like 14 the fax was sent on 9/27/04, a few days before the 15 closing?</p> <p>16 A. Okay. Yes.</p> <p>17 Q. Does that agree with your memory as to when 18 the closing took place?</p> <p>19 A. The closing took place on 9/30/04.</p> <p>20 Q. And you see, if you go through this fax, 21 that there are different entities identified in some 22 wiring instructions. The second page indicates a 23 wire instruction for an account named The Pointe 24 Group, Inc.; do you see that?</p>

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<p style="text-align: right;">Page 46</p> <p>1 A. Yes, I see that.</p> <p>2 Q. If you go a few pages on there are wire 3 instructions for Fidelity National Title; do you see 4 that?</p> <p>5 A. Yes.</p> <p>6 Q. And it was your understanding that that was 7 the deposit escrow; is that correct?</p> <p>8 A. No, that's not correct.</p> <p>9 Q. What was your understanding as to what 10 Fidelity was to do? What escrow responsibilities 11 did they have?</p> <p>12 A. It was my understanding they were going to 13 make all the disbursements on the closing. All 14 monies to be paid were going to be paid through 15 Fidelity.</p> <p>16 Q. You see the next page after that there are 17 wire instructions for Casas, Benjamin & White?</p> <p>18 A. Yes.</p> <p>19 Q. And then --</p> <p>20 A. Wait a minute, I'm sorry. The CBW?</p> <p>21 Q. Yes.</p> <p>22 A. Yes, I see that.</p> <p>23 Q. And then there are wire instructions on the 24 next page for Key Bank?</p>	<p style="text-align: right;">Page 48</p> <p>1 A. That's correct. With regard to 2 disbursements it's my understanding that there was 3 only one exception to Fidelity disbursing funds, and 4 that was a payment to the Commonwealth of 5 Massachusetts for recoupment funds that was going to 6 be paid separately by Goodwin Procter.</p> <p>7 Q. Just so I understand that, meaning that the 8 payment would not go through Fidelity, but would be 9 made directly by Goodwin Procter?</p> <p>10 A. I believe that's correct, yes. This exhibit 11 you have handed me isn't -- I don't know how it has 12 been put together, but it is made up of several 13 different -- appears to be several different either 14 e-mails or faxes.</p> <p>15 Q. Okay.</p> <p>16 A. I think the one that you indicated came from 17 Frank Barker with their wiring instructions, but 18 these other documents were not part of that initial 19 transmission.</p> <p>20 Q. Okay. And you say that because, for 21 example, the first page, Frank Barker's facsimile 22 indicates it has two pages?</p> <p>23 A. Right, right, and I look at the page numbers 24 at the top, so just for clarification.</p>
<p style="text-align: right;">Page 47</p> <p>1 A. Okay, I see that.</p> <p>2 Q. On the last page for Mellon Trust, correct?</p> <p>3 A. Yes.</p> <p>4 Q. Just because I may have misunderstood your 5 prior testimony, what was your understanding as to 6 what escrow funds Mellon Trust would hold and 7 disburse?</p> <p>8 A. Mellon was going to hold the warranty 9 representation escrow, the \$400,000, plus the 16 V 10 escrow.</p> <p>11 Q. Do you know why there were 2 different 12 entities designated to hold escrow funds?</p> <p>13 A. What do you say, Fidelity and --</p> <p>14 Q. -- Mellon.</p> <p>15 A. Well, Fidelity was the disbursement escrow 16 in closing. They shouldn't be holding anything more 17 now.</p> <p>18 Q. I see. And Mellon would hold escrows until 19 such point as they weren't necessary anymore; is 20 that right?</p> <p>21 A. Pursuant to the Escrow Agreement, yes. 22 There are disbursement dates in that Escrow 23 Agreement.</p> <p>24 Q. In the Mellon Escrow Agreement?</p>	<p style="text-align: right;">Page 49</p> <p>1 Q. Well, you'd agree with me, though, that all 2 of the documents that have been grouped together as 3 part of this exhibit appear to be wiring 4 instructions?</p> <p>5 A. They are all wiring instructions, and I 6 assume that we would have compiled them to get them 7 to Terry Nolan at Fidelity. (Document marked as Exhibit 54 for identification.)</p> <p>8 Q. Mr. McCullough, I just have a few questions 9 about this printed out e-mail. You see at the 10 bottom there is an e-mail from Andy Sucoff to Steve 11 Gordon on September 29 at 8:08 a.m. where he is 12 talking about a -- what appears to be a successor 13 liability escrow in the amount of \$162,000; do you 14 see that?</p> <p>15 A. Yes.</p> <p>16 Q. And he says that that is separate from the 17 \$400,000 escrow?</p> <p>18 A. Yes.</p> <p>19 Q. And what was that escrow, the 162,000; what 20 was that intended to address.</p> <p>21 A. That's the 16 V escrow I was referring to 22 that had to do with the anticipated recoupment</p>

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<p style="text-align: right;">Page 50</p> <p>1 against one of the facilities, or any of the 2 facilities, with regard to claims by the 3 Commonwealth after the sale, and the successor 4 liability issue from the Commonwealth's perspective 5 in a nutshell is that they can claim it from a 6 purchaser facility if it's owed by a seller. 7 Q. Was that number, 162,000, something that was 8 negotiated based on expected claims? 9 A. That's right. 10 Q. And if you look at the top, going to the 11 top, it looks like Mr. Gordon perhaps responded to 12 this, and then there is a separate response at the 13 top from you, also dated September 29. You say, 14 Andy, Steve, the TPG folks have advised me that the 15 credit balances at Cranberry have been paid down to 16 approximately 36,000; is that right? 17 A. Mm-mm. 18 Q. And was it your understanding that the 19 escrow amount could be reduced to reflect that? 20 A. We were trying to get it reduced; they 21 wouldn't agree to go along with it. They didn't -- 22 they claimed that their accountants, I think there 23 was Feeley & Driscoll, didn't agree with Landa. L&A 24 is Landa & Altscher.</p>	<p style="text-align: right;">Page 52</p> <p>1 A. Yes. 2 Q. Do you recall, other than sitting here 3 today, seeing this e-mail and the attached invoice 4 from CBW in connection with preparations for the 5 closing? 6 A. I probably did see it. We were rounding up 7 all invoices and wiring instructions to be submitted 8 to Fidelity. 9 Q. And from the time that you were first asked 10 to provide -- your firm was first asked to provide 11 services in connection with this transaction, 12 through the date that this invoice was sent on 13 September 29, did anyone affiliated with The Pointe 14 Groupe ever tell you that they were dissatisfied 15 with any services that CBW provided? 16 A. I never had any conversations with anybody 17 from The Pointe Group about CBW. 18 Q. It would be fair to say, then, that you 19 never heard any complaints about CBW's performance 20 from anyone affiliated with The Pointe Group or the 21 selling entities? 22 A. I had no conversations with anybody about 23 CBW. 24 Q. And did you, between the time you first</p>
<p style="text-align: right;">Page 51</p> <p>1 Q. And whose accountants were they? 2 A. They were the accountants for the seller's 3 facilities. 4 Q. Where are they located? 5 A. They are in Canton. 6 Q. Could you just say that name again. 7 A. Landa, L-a-n-d-a, & Altscher, 8 A-l-t-s-c-h-e-r. 9 Q. And then at the end you say the Hammond 10 calculation remains the same. Is that the abutter 11 issue? What was the Hammond calculation? 12 A. No. 13 Q. What was the Hammond calculation? 14 A. I think the Hammond calculation would be the 15 anticipated recoupments on Hammond. 16 Q. I see. 17 (Document marked Exhibit 55 18 for identification.) 19 Q. Mr. McCullough, I hand you what the Court 20 Reporter has marked as Exhibit 55, and this is the 21 e-mail that you provided this morning before the 22 deposition started, and I believe you had told me 23 that this e-mail was an e-mail that Mary Cole 24 located on her computer; is that correct?</p>	<p style="text-align: right;">Page 53</p> <p>1 became involved in the transaction, through the date 2 of the closing, ever hear from anyone that The 3 Pointe Group or the selling entities were 4 dissatisfied with CBW's services? 5 A. I saw a letter dated October 1 from Atty. 6 Gordon to CBW. 7 Q. The closing was on September 30, the day 8 before? 9 A. Yes. 10 Q. And my question was, From the time you first 11 became involved, through the date of the closing, 12 did you ever hear from anyone that there was any 13 dissatisfaction with the services CBW had provided? 14 A. I never heard any comments about CBW, 15 positive or negative. 16 Q. Prior to the transaction that closed on 17 September 30, had you been involved in any sale 18 transactions where the selling entities had used a 19 company to find potential buyers, and solicit offers 20 from potential buyers, and help clients evaluate 21 potential offers? 22 A. I'm sure I have. 23 Q. And do you remember the names of any of 24 those entities that you remember being involved in</p>

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<p style="text-align: right;">Page 54</p> <p>1 transactions in which you were involved?</p> <p>2 A. No.</p> <p>3 Q. You don't remember any, like, Massachusetts</p> <p>4 companies that provided those services that you --</p> <p>5 A. Well, there have been many closings that I</p> <p>6 have worked at where brokers have been involved in</p> <p>7 some capacity.</p> <p>8 Q. Can you tell me the names of any entities</p> <p>9 that you recall being involved? Obviously I'm</p> <p>10 talking about commercial transactions.</p> <p>11 A. Atrium Nursing Home I'm sure.</p> <p>12 Q. Is that an actual nursing home, or is that</p> <p>13 a --</p> <p>14 A. It's a nursing home.</p> <p>15 Q. I'm sorry.</p> <p>16 A. It's a nursing home.</p> <p>17 Q. Okay, but was there some sort of entity</p> <p>18 involved in that transaction?</p> <p>19 A. Oh, the entity that provided the service? I</p> <p>20 can't recall who got paid in that deal. There were</p> <p>21 several transactions where brokers got paid, but I</p> <p>22 can't recall the names of the brokers.</p> <p>23 Q. In those transactions where you recall folks</p> <p>24 getting paid for those kinds of services, in each of</p>	<p style="text-align: right;">Page 56</p> <p>1 was it important to you to know what was in the</p> <p>2 engagement letter that had been signed?</p> <p>3 A. Was it important for me to know? I mean, I</p> <p>4 read it.</p> <p>5 Q. So is it fair to say that you were aware</p> <p>6 that per the terms of the engagement letter the</p> <p>7 payment due to CBW was due and payable at the</p> <p>8 closing?</p> <p>9 A. All I can say is that this is what the</p> <p>10 document says. I can't comment on it in any other</p> <p>11 way.</p> <p>12 Q. And you had read it before the closing?</p> <p>13 A. I did see this document.</p> <p>14 (Recess taken.)</p> <p>15 (Document marked Exhibit 56</p> <p>16 for identification.)</p> <p>17 Q. I'm going to hand you what been marked as</p> <p>18 Exhibit 56. Mr. McCullough, I have handed you what</p> <p>19 appears to be a draft of the closing statement for</p> <p>20 the September 30, 2004 transaction; would you agree</p> <p>21 with that?</p> <p>22 A. It looks like it, other than the notations</p> <p>23 on it. I don't know what those are.</p> <p>24 Q. If you look at the bottom there is what</p>
<p style="text-align: right;">Page 55</p> <p>1 those transactions were those entities paid out of</p> <p>2 the closing proceeds?</p> <p>3 A. Not all the time, no.</p> <p>4 Q. Tell me what you remember about the</p> <p>5 different circumstances.</p> <p>6 A. Well, I've been in a number of cases where</p> <p>7 brokers were paid at the closing or paid over time</p> <p>8 after the closing.</p> <p>9 Q. How many different times do you think that</p> <p>10 occurred that a broker was paid over time after a</p> <p>11 closing?</p> <p>12 A. I have no idea.</p> <p>13 Q. Do you know what the engagement letter in</p> <p>14 this case required?</p> <p>15 A. I don't recall what it required.</p> <p>16 Q. Why don't we look at that Exhibit 4. If you</p> <p>17 would look at the sections we were looking at</p> <p>18 before, the section entitled Investment Banking</p> <p>19 Services. If you look at the last sentence of that</p> <p>20 particular section which begins, The performance</p> <p>21 incentive payments shall be due and payable at the</p> <p>22 closing of each transaction. Do you see that?</p> <p>23 A. Yes.</p> <p>24 Q. And as the lawyer for the selling entities</p>	<p style="text-align: right;">Page 57</p> <p>1 appears to be a document number in the left-hand</p> <p>2 corner?</p> <p>3 A. Yes.</p> <p>4 Q. Looking at that document number, do you know</p> <p>5 whether that document was created in your office?</p> <p>6 A. No, it was not.</p> <p>7 Q. Do you have a recollection as to who</p> <p>8 prepared the first draft of the closing statement</p> <p>9 for the transaction?</p> <p>10 A. This looks like a document from Goodwin</p> <p>11 Procter.</p> <p>12 Q. You just referenced the fact that on the</p> <p>13 first page of this document there are some</p> <p>14 handwritten notations; do you see those?</p> <p>15 A. Yes.</p> <p>16 Q. Is that your handwriting?</p> <p>17 A. No.</p> <p>18 Q. Do you know whose handwriting it is?</p> <p>19 A. I have no idea.</p> <p>20 Q. If I could just turn your attention to what</p> <p>21 on this document appears as Page 10, I'm sorry, 9 of</p> <p>22 11, and you see at the top it's identified as</p> <p>23 Schedule 7, Closing Costs and Disbursements?</p> <p>24 A. Yes.</p>

15 (Pages 54 to 57)

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<p style="text-align: right;">Page 58</p> <p>1 Q. And there are 2 different columns of closing 2 costs and disbursements, one for the buyer and one 3 for the seller? 4 A. Yes. 5 Q. You see Item No. 4, Broker commissions, and 6 then it says Payable to, and there is a blank, and 7 there is an amount that had been typed in brackets 8 of a million dollars, and somebody has etched that 9 out and written in handwriting \$960,546.46; is that 10 your handwriting? 11 A. No. 12 Q. Do you know whose handwriting it is? 13 A. No idea. 14 Q. In terms of the days leading up to this 15 transaction, in your office which person had the 16 responsibility of reviewing drafts of the closing 17 statement? 18 A. I would. 19 Q. Did Mary Cole also play some part in 20 reviewing drafts of the closing statement? 21 A. She would have probably got a copy of an 22 e-mail, I suppose, or I would given her a copy of 23 documents to make sure we had documents in every 24 category.</p>	<p style="text-align: right;">Page 60</p> <p>1 exchanged between the parties? 2 A. There probably were, yes. 3 Q. Do you recall that the day before the 4 closing you were working fairly late in the evening 5 on getting the closing statement finalized? 6 A. Oh, yes. Well, all other matters too. This 7 was just one of the issues. Closing statement and 8 other matters were going on. 9 Q. And this is the day before the closing? 10 A. Well, right up to closing, yes, and through 11 the closing. 12 Q. You see that this e-mail was sent to you, as 13 well as to, I think, Mary Cole in your office? 14 A. Mary Cole, Mary Anne Tyler, yes. 15 Q. If you look at the next page of the exhibit, 16 if you look at the bottom amount, there is a number 17 reflected there, Amount due from sellers of funds -- 18 due to sellers, sorry? 19 A. Yes. It says to seller, but it's a negative 20 number. 21 Q. Do you recall, the day before the closing, 22 receiving or reviewing a draft settlement statement 23 that had an amount due from the seller in excess of 24 a million dollars?</p>
<p style="text-align: right;">Page 59</p> <p>1 Q. Do you remember, independent of whose 2 handwriting is on this page that we just looked at, 3 there being a determination in the days leading up 4 to the closing that the amount due to CBW, rather 5 than this initial rounded amount that appears of a 6 million dollars, was \$960,546? 7 A. I don't recall that. I'd have to look at 8 the bill from Casas, Benjamin. It doesn't refresh 9 my memory as to whether that was the number. 10 Q. Well, looking at the amount that's on the 11 invoice, which is more than 960,000, do you recall 12 conversations with anyone as to whether the amount 13 should be less than the amount that is reflected on 14 the invoice? 15 A. No, I don't recall conversations. 16 Q. I'll hand you what was previously marked as 17 Deposition Exhibit 29, and you will see that appears 18 to be another e-mail with another draft of a closing 19 statement, this one on the day before the closing, 20 September 29? 21 A. Yes. 22 Q. And do you recall that the day before the 23 closing there were a number of draft settlement 24 statements, or closing statements, that were</p>	<p style="text-align: right;">Page 61</p> <p>1 A. Yes. 2 (Document marked as Exhibit 59 3 for identification.) 4 Q. I'm going to hand you what the Court 5 Reporter has marked as Exhibit 59. 6 ATTY. GORDON: 59? 7 ATTY. HIGGINS: Yes. 8 ATTY. GORDON: Are you going to use 57 9 and 58? 10 ATTY. HIGGINS: Oh, I'm sorry. These 11 were marked out of order. They will be exhibits. 12 Q. Mr. McCullough, this e-mail that has been 13 marked as Exhibit 59, the originating e-mail is one 14 from Andy Sucoff to various individuals, also on 15 Wednesday September 29 at 8:31 p.m., and this 16 printout also reflects your response to that e-mail 17 which went from you to Mr. Sucoff; is that correct? 18 A. Yes. 19 Q. And in that e-mail you say, Andy, thanks for 20 the revised closing statement. I have forwarded it 21 to my client, and they have made provisions for the 22 amount due from sellers. See you tomorrow. You see 23 that? 24 A. Yes.</p>

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<p style="text-align: right;">Page 62</p> <p>1 Q. And at the time you sent this e-mail to Mr. 2 Sucoff, were you intending to communicate to Mr. 3 Sucoff that your clients would be bringing in excess 4 of a million dollars to the closing the following 5 day?</p> <p>6 A. I was intending to communicate that we were 7 going to proceed with the closing. Were they going 8 to bring a million dollars; I don't know.</p> <p>9 Q. Well, this e-mail to Mr. Sucoff says that 10 provisions have been made, correct?</p> <p>11 A. That's what it says.</p> <p>12 Q. Did you know whether provisions had been 13 made when you sent the e-mail?</p> <p>14 A. I probably had some communication with my 15 clients. I'm sure I sent them the closing 16 statement. What time is this? Is there a time on 17 this; 8:31. There is no time on my e-mail; why is 18 that?</p> <p>19 Q. You see your e-mail has a date of 9/29, 20 correct?</p> <p>21 A. Yes, I do see that.</p> <p>22 Q. When you sent this e-mail to Mr. Sucoff, 23 what was your understanding as to the amounts that 24 would be due from the sellers to have the</p>	<p style="text-align: right;">Page 64</p> <p>1 ready to go over there and see if we could close the 2 sale. I think that was the substance of the 3 conversation. I was waiting for -- I think I had 4 received earlier that day discharges from Key Bank 5 to get to Terry Nolan.</p> <p>6 Q. Do you remember within that conversation 7 with Ms. Kauffman any discussion as to whether the 8 numbers had been finalized and whether there was 9 enough money to close the transaction?</p> <p>10 A. I don't recall if we talked about money. I 11 told her we were going to go over and I probably 12 asked her if she was coming down.</p> <p>13 Q. If you look at the second e-mail from the 14 top, there is an e-mail from Steven Gordon to Ms. 15 Kauffman in response to hers, and his is pretty 16 short. It says, And is there enough money, and Ms. 17 Kauffman responds at 10:46 p.m. on September 29, I 18 understand from John McCullough that everything is 19 set for tomorrow. Do you see that?</p> <p>20 A. I see that, yes.</p> <p>21 Q. And in the e-mail that we just looked at you 22 indicated to Mr. Sucoff, Exhibit 59, on the same day 23 that the clients had made provisions to bring the 24 amount that was due from the sellers, correct?</p>
<p style="text-align: right;">Page 63</p> <p>1 transaction close?</p> <p>2 A. Well, it would be the last amount that 3 appeared on the last settlement statement.</p> <p>4 Q. The number that was in excess of a million 5 dollars?</p> <p>6 A. Looks like that would be the number, yes.</p> <p>7 Q. I'm going to go back to the correct order. 8 I'm handing you what has been marked as -- strike 9 that. Let me hand you first what was previously 10 marked at Mr. Freid's deposition as No. 31, and you 11 see at the top of that e-mail -- well, the second 12 e-mail down, there is an e-mail -- there is an 13 e-mail, it's actually the third e-mail down, from 14 Madeline Kauffman to Steve Gordon the same day, 15 September 29 at 10:27 p.m., where Ms. Kauffman says 16 that John McCullough called here around 10:00 p.m. 17 to confirm that he, meaning you, and Andy had 18 finalized. Do you remember having a conversation 19 with Ms. Kauffman on the night of September 29 and 20 indicating to her that the closing statement had 21 been finalized?</p> <p>22 A. I had a conversation with her that night. I 23 believe I -- she had called me, and I indicated to 24 her that from a document perspective we appeared</p>	<p style="text-align: right;">Page 65</p> <p>1 A. It was my understanding we were going to go 2 forward with the closing.</p> <p>3 Q. And it was further your understanding, as 4 you communicated to Mr. Sucoff, that your clients 5 had made provisions for the amount that was due?</p> <p>6 A. That's what the e-mail says, yes. (Document marked as Exhibit 57 for identification.)</p> <p>9 Q. I'm handing you what has been marked as 10 Exhibit 57. This exhibit 57, again just looking at 11 the bottom, left-hand corner, there is a different 12 indicator. It says TPG Closing Statement, 13 parenthesis, 9, close parenthesis; do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. Do you recognize that to be something that 16 appears on documents generated by your office?</p> <p>17 A. No, I think the closing statement entirely 18 was generated by Goodwin Procter.</p> <p>19 Q. And you see in the right-hand corner of this 20 Exhibit 57 there is a date and a time, 9/30/2004, 21 8:20 a.m.; do you see that in the right-hand corner?</p> <p>22 A. Yes.</p> <p>23 Q. And that was the date of the closing, 24 correct, September 30?</p>

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<p style="text-align: right;">Page 66</p> <p>1 A. That's the day that we met at Goodwin 2 Procter, yes.</p> <p>3 Q. And at 8:20 a.m. on that date closing 4 statement which appears to be version 9 reflected 5 net funds due to seller a negative number of 6 1,093,310, correct?</p> <p>7 A. Yes.</p> <p>8 Q. Do you remember -- you went to Goodwin 9 Proctor's office that day, correct, September 30?</p> <p>10 A. Yes.</p> <p>11 Q. Do you remember what time you got there?</p> <p>12 A. Probably around 9:00. I don't know if I had 13 this before I went, but maybe not, but if I didn't, 14 they had a copy there.</p> <p>15 Q. And if you look at what appears on this one 16 as Page 10 of 11, and again this is Schedule 7, 17 Closing Costs and Disbursements, and you see that 18 under Item 4, listed as a cost to the seller is an 19 amount due to CBW of \$960,546.46; do you see that?</p> <p>20 A. I do.</p> <p>21 Q. When you went to the closing on September 30 22 around 9:00, or whenever you arrived, was it your 23 understanding that your clients would be bringing 24 the amount that is reflected on this closing</p>	<p style="text-align: right;">Page 68</p> <p>1 Q. I'm going to hand you what is marked as 2 Exhibit 58. Mr. McCullough, looking at the document 3 that has been marked as Exhibit 58, would you agree 4 with me that this document indicates in the lower 5 right-hand corner a date of 9/30/2004, 8:37 a.m.?</p> <p>6 A. I see that, yes.</p> <p>7 Q. And again this document still has a number 8 due from the seller of in excess of a million 9 dollars?</p> <p>10 A. It seems to be the same number as Exhibit 11 57, yes.</p> <p>12 Q. And again on page 11 of 12 we still show an 13 amount payable to Casas, Benjamin & White of in 14 excess of \$960,000?</p> <p>15 A. That's what it shows.</p> <p>16 Q. I'm handing you what has been marked as 17 Exhibit 60. (Document marked as Exhibit 60 for identification.)</p> <p>18 Q. Mr. McCullough, would you agree with me that 19 this is yet another version of the closing 20 statement, this one with a date of 9/30/2004, 9:28 21 a.m.?</p> <p>22 A. That's what it says. I have, however, no</p>
<p style="text-align: right;">Page 67</p> <p>1 statement generated the morning of the closing, in 2 excess of a million dollars, to close the 3 transaction?</p> <p>4 A. It was my understanding that from a 5 financial perspective arrangements had been made to 6 proceed with the closing --</p> <p>7 Q. And as of --</p> <p>8 A. -- the best we could.</p> <p>9 Q. -- as of 8:20 a.m. on 9:30 that proceeding 10 with the transaction would require the seller to 11 bring in excess of a million dollars?</p> <p>12 A. I don't know if I knew they were going to 13 bring a million dollars. I have no recollection 14 that I knew they were going to bring a million 15 dollars.</p> <p>16 Q. But it was your understanding that they had 17 made provisions to come up with sufficient funds to 18 close the transaction; is that right?</p> <p>19 A. Either come up with sufficient funds or made 20 alternate arrangements. This is not the settlement 21 statement that was executed, I believe.</p> <p>22 Q. We are going to get to those. (Document marked as Exhibit 58 for identification.)</p>	<p style="text-align: right;">Page 69</p> <p>1 memory that I actually saw these, if that is what 2 you are asking me, because these do not appear to be 3 e-mails. These were probably being generated over 4 at Goodwin Procter. I don't know -- and it says 5 1XLS, I don't know what that means, but I have no 6 idea if these were the ones we were working with 7 over there.</p> <p>8 Q. My question was whether you agree with me 9 that this document has a date of 9/30/2004 and time 10 of 9:28 a.m.?</p> <p>11 A. That's what it says, yes.</p> <p>12 Q. Do you know if you were at Goodwin Procter 13 at this time?</p> <p>14 A. Yes, we probably were. I think we were 15 there by 9:00, quarter of 9:00, 9:00.</p> <p>16 Q. If I could just ask you to look at the 17 Schedule 7. It's Page 10 of 11. You see, again 18 this is Schedule 7, looking at item 4 do you see 19 that somebody has crossed out the number \$960,546; 20 do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. Looking at this whole page, is any 23 handwriting on this page yours?</p> <p>24 A. No.</p>

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<p style="text-align: right;">Page 70</p> <p>1 Q. Do you know whose handwriting it is? 2 A. No. 3 Q. Did you instruct -- strike that. Was your 4 understanding that Goodwin Procter was in charge of 5 generating these different generations of the 6 closing statements? 7 A. They were doing that, yes. 8 Q. And Goodwin Procter, the attorneys there, 9 they were representing the buyer, correct? 10 A. Yes. 11 Q. Did you tell any of the attorneys at Goodwin 12 Procter, or any of the paralegals, to strike out 13 that number? 14 A. I believe I told Andy Sucoff that we would 15 deal with the broker commission outside of closing. 16 Q. You see that someone has written here next 17 to Casas, Benjamin & White, LLC, parenthesis, POC, 18 close parenthesis? Do you see that? 19 A. Yes. 20 Q. Do you have an understanding as to what POC 21 means? 22 A. It means outside of closing. 23 Q. So pay it outside of closing? 24 A. I think that's what it means, yes, pay</p>	<p style="text-align: right;">Page 72</p> <p>1 would deal with the broker commission outside of the 2 closing, had you, without revealing the substance of 3 any communications, had you spoken with anyone 4 affiliated with the sellers about that issue? 5 ATTY. GORDON: Just yes or no. 6 A. Yes. 7 Q. And, again, without revealing the substance 8 of any such communications, before telling Mr. 9 Sucoff that the sellers would deal with the broker 10 commission outside of the closing, had you discussed 11 that issue with Barry Freid? 12 ATTY. GORDON: I'm going to instruct the 13 witness not to answer that question. 14 ATTY. HIGGINS: It's a yes-or-no 15 question. 16 ATTY. GORDON: I understand that. I'm 17 going to instruct him not to answer the question. 18 ATTY. HIGGINS: And on what, just to 19 make sure for the record? 20 ATTY. GORDON: On the grounds of 21 privilege. 22 Q. All right, I'm going to ask a similar 23 question. Prior to telling Mr. Sucoff that the 24 sellers would deal with the broker's commission</p>
<p style="text-align: right;">Page 71</p> <p>1 outside of closing. It's a typical standard 2 reference. 3 Q. What was Andy Sucoff's response to that? 4 A. He didn't have any response. I just said we 5 are going to deal with it outside of closing, and he 6 adjusted the -- he would make the adjustment he 7 said. We were going over many other issues at the 8 same time. 9 Q. And before you told Mr. Sucoff that -- well, 10 let me ask this question, When you told Mr. Sucoff 11 that we would deal with the broker commission out of 12 the closing, who were you referring to? 13 A. The sellers. 14 (Court Reporter changes paper.) 15 Q. Before you told Mr. Sucoff that the sellers 16 would deal with the broker commission outside of the 17 closing, did you have any conversations with anyone 18 at Casas, Benjamin & White as to whether that was 19 acceptable to Casas, Benjamin & White? 20 A. I did not. 21 Q. Did anyone tell you that they had had such a 22 conversation with anyone at Casas, Benjamin & White? 23 A. I don't recall if anybody told me that. 24 Q. Prior to telling Mr. Sucoff that the sellers</p>	<p style="text-align: right;">Page 73</p> <p>1 outside of the closing, again without revealing the 2 substance of any communications, had you discussed 3 that issue with Gerald Freid? 4 ATTY. GORDON: I'm going to instruct the 5 witness not to answer the question on the grounds 6 of privilege. 7 ATTY. HIGGINS: I'll object to that 8 instruction. 9 Q. Mr. McCullough, prior to telling Mr. Sucoff 10 that you would deal with the broker commission 11 outside of the closing, had you discussed that issue 12 with Mark Tobin? 13 ATTY. GORDON: I'm going to instruct the 14 witness not to answer that question on the grounds 15 of privilege. 16 Q. Had you discussed the issue -- let me start 17 again. Prior to telling Mr. Sucoff that the sellers 18 would deal with the broker commission outside of the 19 closing, had you discussed that issue with Mr. 20 Gordon? 21 ATTY. GORDON: I'm going to instruct the 22 witness not to answer that question on the grounds 23 of privilege. 24 Q. Mr. McCullough, had you discussed that</p>

19 (Pages 70 to 73)

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<p style="text-align: right;">Page 74</p> <p>1 issue, the issue that I have just been talking 2 about? Had you discussed that issue, again without 3 telling me the substance of such communications, 4 with Georgia Freid?</p> <p>5 ATTY. GORDON: I'm going to instruct the 6 witness not to answer the question on the grounds of 7 privilege.</p> <p>8 Q. Let me just try it a slightly different way. 9 Mr. McCullough, prior to telling Mr. Sucoff that the 10 sellers would deal with the broker commission 11 outside of the closing, had anyone affiliated with 12 The Pointe Group authorized you to make that 13 communication to Mr. Sucoff?</p> <p>14 ATTY. GORDON: I'm going to instruct the 15 witness not to answer that question on the grounds 16 of privilege.</p> <p>17 ATTY. HIGGINS: Even though my question 18 regards a communication that was to be made to a 19 third party?</p> <p>20 ATTY. GORDON: My instruction stands.</p> <p>21 ATTY. WORCESTER: Could you read back 22 Erin's last question. (Question read.)</p> <p>23 ATTY. HIGGINS: Let's go off the record</p>	<p style="text-align: right;">Page 76</p> <p>1 that's all on our side, I think. 2 Q. And do you remember -- 3 A. And Georgia Freid. 4 Q. Do you remember how long you were at 5 Goodwin's offices that day? Was it a full day, less 6 than a full day? 7 A. We were there until 5:30, quarter of 6:00, 8 and maybe later, actually. 9 Q. Among the people you just identified as 10 being there on The Pointe Group side, did all those 11 people remain there for the day or did some people 12 leave? 13 A. I think at a point in time in the afternoon 14 we tried to get as many documents that Georgia had 15 to sign out of the way. She is a relatively elderly 16 woman, and we wanted to accommodate her, and I think 17 we accomplished that, so she left at some time. I 18 think Jerry, perhaps, took her at some point in the 19 middle to late afternoon. 20 Q. And did he return, do you know? 21 A. I don't believe he did. I think he drove 22 her home or wherever she was staying. 23 Q. How about Mr. Gordon? Do you remember if 24 Mr. Gordon was there that day?</p>
<p style="text-align: right;">Page 75</p> <p>1 for a second. (Discussion off the record.)</p> <p>3 ATTY. HIGGINS: I just want the record 4 to reflect that while we were off the record counsel 5 discussed whether to suspend Mr. McCullough's 6 deposition now for the purpose of obtaining the 7 judge's ruling on whether Mr. McCullough should be 8 required to answer questions, the questions that I 9 just posed to Mr. McCullough, whether we would 10 suspend his deposition at the end of today, then 11 seek the judge's ruling on whether he should be 12 required to answer those questions, which might 13 entail Mr. McCullough coming back for a subsequent 14 deposition to answer questions as the judge directs, 15 and I just want to make it clear for the record that 16 I'm reserving my right to do that.</p> <p>17 ATTY. GORDON: And we have agreed to do 18 that.</p> <p>19 Q. Getting back to the closing itself, do you 20 recall who was present at Goodwin's offices that day 21 from The Pointe Group side of things?</p> <p>22 A. Yes, there were a number of people, Mark 23 Tobin, Jerry Freid, Barry Freid, Steve Gordon, Frank 24 Barker, Mary Anne Tyler, Mary Cole, myself, and</p>	<p style="text-align: right;">Page 77</p> <p>1 A. Oh, yes, he was there. I listed him 2 earlier. 3 Q. Do you remember whether he was at the 4 closing the entire day? 5 A. He was there until late in the afternoon 6 around, my guess is, I remember around 5:00 or so. 7 Q. Other than the folks affiliated with The 8 Pointe Group, who else was at the closing that day? 9 A. A number of representatives from Epoch, all 10 of whom I don't remember. I don't know if we had a 11 sign-in sheet or not, but of course there was a 12 cadre of attorneys from Goodwin Procter, including 13 Andy Sucoff, David Henken, Lori Woodward, and 14 several other department attorneys that came in and 15 out of the closing. 16 Q. And you may have listed this before, who 17 else from your office was there? 18 A. Mary Cole, Mary Anne Tyler. 19 Q. Were they there the entire day as well? 20 A. Oh, yes. 21 Q. And do you recall that during the day that 22 you were there different versions of the closing 23 statement were prepared? 24 A. Yes.</p>

20 (Pages 74 to 77)

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<p style="text-align: right;">Page 78</p> <p>1 Q. And were those all word-processed at 2 Goodwin's offices? 3 A. I believe that's correct. 4 Q. Was anyone else present from Key Bank? 5 A. No. 6 Q. Did anyone participate in the closing by 7 conference call as opposed to being there in person? 8 A. No. Let me -- to my knowledge, no. I don't 9 know if anybody called the Epoch Group. I have no 10 idea. 11 Q. Were the folks affiliated with The Pointe 12 Group in one room and the folks with Epoch in the 13 other room; is that how it was working? 14 A. Yes. When we originally walked in we all 15 went into the main conference room where they asked 16 us to go into a smaller conference room, and then 17 periodically during the day we were in several 18 different offices at Goodwin, the main conference 19 room, side room, several side rooms. 20 Q. During the day of the closing did you have 21 any communication with anyone from Key Bank? 22 A. No. During the closing, no. 23 Q. Do you know whether anyone from Key Bank 24 called in to see if the closing had actually</p>	<p style="text-align: right;">Page 80</p> <p>1 closing you knew that that was not CBW's 2 understanding, correct? 3 A. That is not the conversation I have 4 testified to. I said that we would deal with it 5 outside of closing; I didn't say we would pay it 6 outside of closing. That's not my testimony. 7 Q. When you told Andy Sucoff that the sellers 8 would deal with CBW's fee outside of the closing, 9 you knew that CBW expected to be wired funds on the 10 day of the closing, correct? 11 A. We had an invoice. I would say that I was 12 aware that they had sent an invoice expecting to get 13 paid, yes. 14 Q. You were aware they had sent wire 15 instructions, correct? 16 A. Oh, yes. 17 Q. On the day of the closing did you have 18 conversations with anyone in which any 19 dissatisfaction was expressed with the quality of 20 CBW's services? 21 ATTY. GORDON: On the day of the 22 closing? 23 ATTY. HIGGINS: (Nod.) 24 ATTY. GORDON: On the day of the</p>
<p style="text-align: right;">Page 79</p> <p>1 occurred? 2 A. During the closing I have no idea. 3 Q. At the time you told Mr. Sucoff that the 4 broker's fee would be taken care of outside of the 5 closing, did you have any concern that the terms of 6 the engagement letter were being breached? 7 ATTY. GORDON: I'm going to instruct the 8 witness not to answer that question. 9 ATTY. HIGGINS: On what grounds? 10 ATTY. GORDON: Privilege. 11 ATTY. HIGGINS: I'm asking about his 12 concerns. 13 ATTY. GORDON: He can only have a 14 concern as a lawyer. Are you asking him if he has a 15 concern other than as a lawyer? 16 ATTY. HIGGINS: No. 17 ATTY. GORDON: Then my objection stands. 18 ATTY. HIGGINS: Okay. We might have 19 more than a few questions to take up with the judge. 20 Q. We previously looked at and marked as 21 exhibits documents that came into your office from 22 CBW, including an invoice from CBW and wiring 23 instructions from CBW. When you told Andy Sucoff 24 that the broker's fee would be paid outside of the</p>	<p style="text-align: right;">Page 81</p> <p>1 closing. 2 A. On the day of the closing. I think it's 3 difficult to answer that question without getting 4 into conversations with clients. 5 Q. Well, it's only a yes-or-no question. 6 A. Then I would say yes. 7 Q. Did you understand that CBW had brought 8 Epoch to the transaction? 9 A. I'm not sure that I understood that. I 10 assumed they had some role, but I'm not for sure 11 that they brought Epoch. 12 Q. You don't know one way or the other? 13 A. No. 14 Q. Other than that conversation that you have 15 testified to having with Mr. Sucoff on the day of 16 the closing about the fee that was reflected on the 17 closing statement, did you have conversations with 18 anyone on the day of the closing, other than your 19 clients, about CBW's fee? 20 A. No. 21 (Document marked as Exhibit 61 22 for identification.) 23 Q. I'm going to hand you what was marked as 24 Exhibit 61. Mr. McCullough, before we get to that</p>

21 (Pages 78 to 81)

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<p style="text-align: right;">Page 82</p> <p>1 exhibit, at the time that you spoke to Mr. Sucoff, 2 and you made a point earlier of clarifying your 3 testimony, it's your memory that you said to Mr. 4 Sucoff that the sellers would deal with CBW's fee 5 outside of the closing; is that right?</p> <p>6 A. Yes.</p> <p>7 Q. Did you have an understanding at the time 8 you had that conversation with Mr. Sucoff as to 9 whether CBW was going to be paid?</p> <p>10 ATTY. GORDON: I'm going to instruct the 11 witness not to answer the question on the grounds of 12 privilege.</p> <p>13 ATTY. HIGGINS: It's a yes-or-no 14 question; you are not going to let him answer that 15 question?</p> <p>16 ATTY. GORDON: No, I'm not.</p> <p>17 Q. Mr. McCullough, if you could look at Exhibit 18 61, and you see that that has a date of 9/30/2004, 19 and it's dated -- the time is 1:18 p.m. in the 20 lower, right-hand corner?</p> <p>21 A. Mm-mm. Yes. Sorry.</p> <p>22 Q. You see that Schedule 7, if you look again 23 at page -- now it's page 9 of 10?</p> <p>24 A. Yes, I see it.</p>	<p style="text-align: right;">Page 84</p> <p>1 (Last question and answer read.)</p> <p>2 Q. At the time you had the conversation with 3 Mr. Sucoff that you testified to before instructing 4 him that that could be deleted from the seller's 5 side of the closing statement, did you believe that 6 you were authorized by your clients to make that 7 communication to Mr. Sucoff?</p> <p>8 ATTY. GORDON: I'm going to object and 9 instruct the witness not to answer on the grounds of 10 privilege.</p> <p>11 Q. Mr. McCullough, I'm just going to ask you 12 this question with respect to all the questions that 13 Mr. Gordon has instructed you not to answer. Are 14 you accepting Mr. Gordon's instruction not to answer 15 those questions?</p> <p>16 A. Yes.</p> <p>17 Q. Just looking again at Exhibit 61, which is 18 still in front of you, you see there is still some 19 handwriting on the first page of that exhibit?</p> <p>20 A. Yes.</p> <p>21 Q. Is any of that handwriting yours?</p> <p>22 A. No.</p> <p>23 Q. During the day of the closing were you 24 looking at various drafts of closing statements?</p>
<p style="text-align: right;">Page 83</p> <p>1 Q. You see that now there is no figure next to 2 the amount due Casas, Benjamin & White?</p> <p>3 A. Correct.</p> <p>4 Q. That's in accord with what you told Mr. 5 Sucoff to do?</p> <p>6 A. Yes.</p> <p>7 Q. If you look at the first page, the net funds 8 due to seller number has changed pretty 9 dramatically, hasn't it?</p> <p>10 A. It has changed, yes.</p> <p>11 Q. And as a result of the deletion of CBW's 12 fee from the sellers side of the closing statement, 13 your client now, instead of having to bring over a 14 million dollars to the transaction, according to 15 this settlement sheet they need to bring 176,000 and 16 change to get the transaction closed?</p> <p>17 A. Well, there is other modifications also on 18 the statement that bring it down to that number.</p> <p>19 Q. Would you agree with me that the primary 20 adjustment was the deletion of CBW's fee?</p> <p>21 A. The primary adjustment actually as to the 22 largest dollar amount, yes.</p> <p>23 (Cell phone rings.)</p> <p>24 (Recess taken.)</p>	<p style="text-align: right;">Page 85</p> <p>1 A. Periodically they would come back in with a 2 closing statement.</p> <p>3 Q. And you would get a copy of that?</p> <p>4 A. Yes.</p> <p>5 Q. Do you recall, as the day went on, making 6 notes on those closing statements?</p> <p>7 A. No.</p> <p>8 Q. Did you retain copies of the different 9 versions of the closing statements you received on 10 the day of the closing?</p> <p>11 A. I don't think so. They were working 12 statements, and the only statement we retained was a 13 copy of the signed statement at the end of the day.</p> <p>14 Q. It wouldn't be your practice to keep the 15 drafts in a separate file, or anything like that?</p> <p>16 A. Not that day, no.</p> <p>17 (Document marked as Exhibit 62 18 for identification.)</p> <p>19 Q. I'm handing you what has been marked as 20 Exhibit 62. Mr. McCullough, you see that this 21 Exhibit 62 has a date on it in the lower right-hand 22 corner of the first page, 9/30/2004, 3:14 p.m.; do 23 you see that?</p> <p>24 A. Yes.</p>

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<p style="text-align: right;">Page 86</p> <p>1 Q. Is any of the handwriting that appears on 2 the first page of this exhibit yours?</p> <p>3 A. No. I testified I have not made any notes 4 on any of these statements.</p> <p>5 Q. If you could just look at Page 10 of 11 on 6 this one. Is that true with respect to that 7 handwriting as well, that that is not your 8 handwriting?</p> <p>9 A. I made no notes on any of these statements.</p> <p>10 Q. I'm handing you what is marked as Exhibit 11 63, Mr. McCullough. Looking at that exhibit it 12 appears to be a printout of an e-mail from Mary Anne 13 Tyler to Andy Sucoff on September 30, 2004, and then 14 it says from you enclosed is the start of a closing 15 memorandum. We will complete it as the day goes on. 16 Could you explain to me what was happening here? 17 Was someone working at your office while you were at 18 Goodwin Procter's office?</p> <p>19 A. No, this would have gone before. It's 20 curious there is no time on this. Our e-mails that 21 we would save have time frames on it, but I don't 22 see any time of day on it. This would have been 23 early in the day. We were working on a closing 24 memorandum, and we continued to work on it during</p>	<p style="text-align: right;">Page 88</p> <p>1 finished?</p> <p>2 A. Parties to the transaction.</p> <p>3 Q. Would that include Key Bank?</p> <p>4 A. I don't think Key was part of that closing 5 memo.</p> <p>6 Q. So you don't -- as you were drafting, was it 7 your intention it would go to Key, as well as to the 8 sellers and the buyer?</p> <p>9 A. I don't think so. It's in the closing 10 binder. It describes who would participate in what. 11 Is that it?</p> <p>12 Q. This is the closing memo.</p> <p>13 A. Yes. (Document marked as Exhibit 64 for identification.)</p> <p>14 Q. I'm handing you what is marked as Exhibit 15 64. Mr McCullough, is Exhibit 64 the closing 16 memorandum that was prepared by your office?</p> <p>17 A. No.</p> <p>18 Q. Do you recognize Exhibit 64?</p> <p>19 A. Yes.</p> <p>20 Q. And what does it appear to you to be?</p> <p>21 A. It's a closing memo that was prepared jointly by Goodwin Procter and ourselves.</p>
<p style="text-align: right;">Page 87</p> <p>1 the closing.</p> <p>2 Q. Now, how did you work on it during the 3 closing if you were at Goodwin's offices?</p> <p>4 A. We worked on it at Goodwin's offices. They 5 put it on their computer system.</p> <p>6 Q. I see. Was that a document that you 7 initially generated and then it was worked on at 8 Goodwin's office?</p> <p>9 A. I think the agreement was Andy would do the 10 settlement statement and I would work on a closing 11 memo.</p> <p>12 Q. And that was something you started before 13 going over to Goodwin, and then you continued to 14 work on it at Goodwin's offices?</p> <p>15 A. Yes. Through the day a number of items got 16 added to it, and numbers attached to it, and some 17 obligation of the parties after closing, continuing 18 obligations.</p> <p>19 Q. Were you working on a laptop or was the 20 document actually on Goodwin's system?</p> <p>21 A. It was on Goodwin's system.</p> <p>22 Q. And the closing memo, as you were working on 23 it during the day, what was your understanding as to 24 who that would be distributed to once it was</p>	<p style="text-align: right;">Page 89</p> <p>1 Q. And it consists of -- there is a 2-page 2 document at the front, and then there is a closing 3 statement attached to it which has 2 different 4 signature pages, one signed by Mark Tobin, and an 5 agent of Fidelity, and then one signed by the 6 buyer's nominee?</p> <p>7 A. That's what it looks like.</p> <p>8 Q. And then there is schedules to the closing 9 statements attached?</p> <p>10 A. Yes.</p> <p>11 Q. This exhibit that has been marked as 64, in 12 your mind does that constitute the closing 13 memorandum?</p> <p>14 A. Yes, I would say it does.</p> <p>15 Q. And is your office system that this 16 generally would be in front of the closing binder?</p> <p>17 A. It's in their binder, yes.</p> <p>18 Q. And the first 2 pages of the closing 19 memorandum, those detail certain things that were 20 intended to take place after the closing?</p> <p>21 A. Yes. These are operational issues that, 22 during the transfer of a health care facility, sort 23 of is an ongoing dynamic for these issues.</p> <p>24 Q. And can you give me a general idea as to</p>

23 (Pages 86 to 89)

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<p style="text-align: right;">Page 90</p> <p>1 when all of these 7, I think there are 7 issues, 2 were completed.</p> <p>3 A. Let's see. I think No. 1 was completed 4 within the next couple of pay periods, I believe. 5 There was -- I believe there was -- by DPH regs 6 there was an ultimate transfer of forms on the P&A 7 monies, No. 2. That was probably within 30 days, I 8 believe. Vacation issues are still outstanding on 9 No. 3. I do not know if the Medicaid user fee has 10 been finalized.</p> <p>11 Q. How about Item 5?</p> <p>12 A. Medicaid short year adjustment, I do not 13 know that either. Sometimes that depends on 14 subsequent Medicaid audits. It's supposed to be 15 paid over 10 months, so whether that has been 16 completed, I don't know.</p> <p>17 Q. How about Item 6?</p> <p>18 A. I believe that was completed, because it was 19 an adjustment of private pay. I assume both parties 20 got together and worked out their numbers on that, 21 and then 7 would be subsequent bills, probably 22 within the next 30 to 60 days after closing.</p> <p>23 Q. Have you continued to represent the sellers 24 with respect to these issues, these post closing</p>	<p style="text-align: right;">Page 92</p> <p>1 A. No, that was the title insurance premium 2 payable to Fidelity National. That was their 3 payment for the title premium.</p> <p>4 Q. Do you know whether that amount was actually 5 paid to Fidelity?</p> <p>6 A. I assume it was. I assume that they paid 7 themselves out of the money it received.</p> <p>8 Q. Just in general, the numbers on this 9 Schedule 7, these would not have changed, correct, 10 these were numbers that were finalized at the 11 closing?</p> <p>12 A. I believe that's correct. I think that 13 Terry Nolan signed this somewhere.</p> <p>14 Q. I think we looked at that. You said that 15 his signature appeared next to Mark Tobin's.</p> <p>16 A. I believe that's right, yes. It's not 17 legible, but I think it's his.</p> <p>18 Q. Going down the schedule you see there is 19 transfer and recording taxes, recording fees. If we 20 skip to Item 5, that's, we have talked about this 21 already, the escrow for successor liability?</p> <p>22 A. Yes.</p> <p>23 Q. That was payable to Mellon Trust, correct?</p> <p>24 A. That's correct.</p>
<p style="text-align: right;">Page 91</p> <p>1 issues?</p> <p>2 A. In some issues we are involved, not all of 3 them.</p> <p>4 Q. Do you know whether the sellers are 5 represented by other counsel with respect to some of 6 these 7 issues?</p> <p>7 A. I don't believe anyone else is working with 8 them on that, to my knowledge.</p> <p>9 Q. Looking at the closing statement that is 10 signed here, if I could just ask you to turn to 11 Schedule 7. Here it's pages 9 and 10 of 11. I just 12 wanted to run through this with you starting with 13 Item 1, the title insurance premium. It says 14 payable to Fidelity National. Now that was the 15 escrow agent, correct?</p> <p>16 A. That's correct.</p> <p>17 Q. So the ultimate recipient of that --</p> <p>18 A. When you say escrow agent, that was the 19 escrow agent for disbursements of the closing, yes.</p> <p>20 Q. So the ultimate recipient of that money 21 would have been someone other than Fidelity, 22 correct?</p> <p>23 A. The 34,000?</p> <p>24 Q. Yes.</p>	<p style="text-align: right;">Page 93</p> <p>1 Q. Do you know whether the monies that were 2 deposited with Mellon, or wired to Mellon, whether 3 those are still in that escrow fund or whether those 4 have been disbursed?</p> <p>5 A. To my knowledge there has been no 6 disbursement of the escrow funds from Mellon.</p> <p>7 Q. As I said before, I'm not a transactional 8 lawyer, if there were disbursements from the Mellon 9 escrow, would you, as the closing attorney, know 10 about those?</p> <p>11 A. Yes.</p> <p>12 Q. Item 6, General escrow also payable to 13 Mellon, this is the 400,000 escrow we talked about 14 earlier, correct?</p> <p>15 A. That's correct.</p> <p>16 Q. This \$400,000 escrow, that was intended to 17 address both any issues arising out of the DPH 18 investigation -- correct?</p> <p>19 A. That's correct.</p> <p>20 Q. What else was that intended to address?</p> <p>21 A. It was intended to be a security in a way 22 for warranties, and representations, and covenants 23 in the transaction.</p> <p>24 Q. Do you know whether there has been any</p>

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<p>1 disbursement from that escrow? 2 A. There have been no disbursements from the 3 Mellon escrows, 5 or 6. 4 Q. And where this closing occurred in September 5 of '04, you know, in your experience as a 6 transactional lawyer, is that unusual that those 7 escrows still haven't been disbursed? 8 A. No, very common. The escrow is sometimes a 9 period of 2 or 3 years. 10 Q. Do you know whether the DPH investigation is 11 still ongoing? 12 ATTY. GORDON: I'm going to instruct the 13 witness not to answer that question on the grounds 14 of privilege. 15 Q. If you could just turn the page to Item 16 number 7. I think we talked about this escrow as, 17 well, the payment to settle Medicaid, and I think 18 your testimony was that this was an amount that was 19 actually delivered to Goodwin Procter. 20 A. I believe that's right. 21 Q. Now, what was this intended -- this \$869,055 22 payment, what was that for, do you know? 23 A. It was a prior recoupment claim of the 24 Commonwealth of Massachusetts, outstanding balance</p>	<p>Page 94</p> <p>1 Q. So this \$15,000 was agreed as an amount that 2 Epoch would receive to try and deal with this 3 situation? 4 A. Right. That's correct. 5 Q. And then what about Item 10, Reimburse 6 tenant. Is the tenant Sovereign Bank, or is 7 Sovereign Bank where this accounts is? 8 A. Reimburse Sovereign Bank? 9 Q. No, it just says reimburse tenant. What was 10 this amount for? This was an amount that Epoch was 11 going to pay? 12 A. I don't know. I don't remember reading 13 that. I don't have a memory of that. I can't 14 remember what that was. It doesn't appear on other 15 exhibits. 16 Q. You don't have a memory of what that refers 17 to? 18 A. I don't actually. I really don't. Oh, let 19 me make a comment about that. This looks like an 20 Epoch issue and not a sale issue. What was 21 happening at the same time as the closing was their 22 financing with the National REIT, which is one of 23 the reasons we were in another room. They were also 24 closing with them at the same time for their</p>
<p>1 to the Commonwealth of Mass. 2 Q. Do you know, was that a claim that was 3 actually in litigation? 4 A. No, the number had been determined. It was 5 very problematic to pay the Commonwealth. We wanted 6 to deliver a check; they wouldn't take a check. We 7 had to go through a process, so the check was 8 delivered to Goodwin Procter so they would know it 9 would be paid. 10 Q. And that was for sums that the Commonwealth 11 said were due for what? 12 A. Prior years, prior years Medicaid payments. 13 Q. And was that sum of \$869,055 paid to the 14 Commonwealth? 15 A. It's my understanding it was. 16 Q. Item 8 is the Key Bank payoff. Item 9, what 17 does this refer to, neighbor legal fee? 18 A. This was the title encroachment that I had 19 referenced earlier in testimony. Epoch had agreed 20 to take on the effort to resolve it with the 21 neighbor for -- that money is to be paid to the 22 title company. I do not know if that has been paid. 23 I have no idea. That's not part of the Mellon 24 payment.</p>	<p>Page 95</p> <p>1 financing. This looks like an issue related to 2 Epoch, not us. It has got Epoch's wiring 3 instructions. 4 Q. And it appears on the buyers side of the 5 closing statement? 6 A. Yes, it's on the buyer's said, and it's 7 clearly not anything to do with us. 8 (Document marked as Exhibit 65 9 for identification.) 10 Q. May I hand you what was marked as Exhibit 11 65. My question about this document is simply 12 whether your handwriting appears anywhere on this 13 document. 14 A. No. 15 ATTY. HIGGINS: I don't have any more 16 questions about that then. 17 Q. At any time from the day of the closing to 18 the present have you ever had any communications 19 with anyone at Key Bank about the transaction? 20 A. Yes. 21 Q. And when was that? 22 A. The evening of the closing. 23 Q. And whom did you speak with? 24 A. I spoke with Madeline Kauffman. I called</p>

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<p style="text-align: right;">Page 98</p> <p>1 her house that night.</p> <p>2 Q. And you called her as opposed to her calling 3 you?</p> <p>4 A. Mm-mm.</p> <p>5 Q. You have to answer verbally.</p> <p>6 A. Oh, I'm sorry. Yes, I know that.</p> <p>7 Q. And you called her at her house, correct?</p> <p>8 A. Yes.</p> <p>9 Q. Was that after you had left Goodwin, Procter 10 & Hoar?</p> <p>11 A. Yes.</p> <p>12 Q. And were you back in your office at the 13 time?</p> <p>14 A. Yes, I called her from my office. I told 15 her that we had closed, and I believe I told her 16 that monies had been wired, as far as I knew, to 17 Key.</p> <p>18 Q. Did Ms. Kauffman ask you any questions as to 19 what had occurred at the closing?</p> <p>20 A. No.</p> <p>21 Q. Is all you recall of that conversation that 22 you told her that the transaction had closed and 23 that monies had been wired to Key?</p> <p>24 A. Yes, that's right.</p>	<p style="text-align: right;">Page 100</p> <p>1 A. I guess maybe middle morning the next day.</p> <p>2 Q. Did you call her, did she call you?</p> <p>3 A. She called me.</p> <p>4 Q. Can you tell me what was said during that 5 call?</p> <p>6 A. She asked me what happened with CBW.</p> <p>7 Q. What did you tell her?</p> <p>8 A. I told her she should call Steve Gordon.</p> <p>9 Q. And why did you tell her that?</p> <p>10 A. Because Steve was dealing with it.</p> <p>11 Q. And when Ms. Kauffman asked you what 12 happened with CBW, did she ask you specifically 13 whether CBW had been paid?</p> <p>14 A. I think she said she had a call from CBW.</p> <p>15 Q. Was Ms. Kauffman upset or angry?</p> <p>16 A. No, she was her usual conversational tone.</p> <p>17 Q. Did Ms. Kauffman say anything during that 18 call about whether she believed CBW should have been 19 paid at the closing?</p> <p>20 A. No.</p> <p>21 Q. At the time you had that conversation with 22 Ms. Kauffman, do you know whether Key Bank had 23 already done whatever it needed to do to release its 24 liens?</p>
<p style="text-align: right;">Page 99</p> <p>1 Q. Did you tell Ms. Kauffman during that call 2 how much the sellers had had to pay to get the 3 transaction closed?</p> <p>4 A. I only told her that we had closed.</p> <p>5 Q. Did you, that evening send -- did you finish 6 the closing memorandum that evening?</p> <p>7 A. We finished it at the closing.</p> <p>8 Q. Did you actually get a copy of the closing 9 memorandum to take with you at the end of that day?</p> <p>10 A. I think I took a copy of the settlement 11 statement, closing memo.</p> <p>12 Q. Did you ever send a copy of the settlement 13 statement to Key Bank?</p> <p>14 A. Not that I recall.</p> <p>15 Q. After that conversation with Madeline 16 Kauffman and your deposition today, between those 2 17 times, have you talked to anyone from Key?</p> <p>18 A. Yes.</p> <p>19 Q. And -- strike that. Who did you talk to?</p> <p>20 A. Madeline Kauffman.</p> <p>21 Q. Was that the next day?</p> <p>22 A. Yes.</p> <p>23 Q. Was it in the morning, the afternoon, the 24 evening, of the next day?</p>	<p style="text-align: right;">Page 101</p> <p>1 A. Did I have lien releases that we obtained, 2 is that what you are asking me?</p> <p>3 Q. Yes.</p> <p>4 A. I testified earlier that we had obtained 5 lien releases from Key or made arrangements to have 6 them sent to Terry Noland at Fidelity to hold for 7 the closing.</p> <p>8 Q. Was it your understanding that Mr. Noland at 9 Fidelity was to hold those releases in escrow until 10 he was authorized by Key Bank to release them?</p> <p>11 A. I think that's correct. They had to receive 12 the funds. (Document marked as Exhibit 66 for identification.)</p> <p>13 Q. The document I have just handed you, have 14 you ever seen it before?</p> <p>15 A. Well, it looks like an allocation of the 16 purchase price allocated to the various facilities. 17 Whether that's the one ultimately that was agreed 18 on, I don't know. I don't see any other indication 19 of that.</p> <p>20 Q. Did you play a part in either drafting, or 21 revising, or working on, in any way, the Purchase 22 and Sale Agreement for the transaction?</p>

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<p style="text-align: right;">Page 102</p> <p>1 A. Working on the Purchase and Sale Agreement, 2 yes, yes.</p> <p>3 Q. Do you recall that the Purchase and Sale 4 Agreement had attached to it an exhibit that was an 5 allocation of the purchase price?</p> <p>6 A. I think there was ultimately an allocation 7 agreed on.</p> <p>8 Q. Do you remember whether that was agreed on 9 before or after the closing?</p> <p>10 A. I think there was language in the Purchase 11 and Sale Agreement that talks about an allocation 12 within 30 days of closing.</p> <p>13 Q. Did you personally participate in any way in 14 coming up with the allocation that is reflected 15 here?</p> <p>16 A. No, I believe the accountants on both buyers 17 and sellers worked on the allocation.</p> <p>18 Q. And I think you testified earlier to the 19 accountants for the selling entities, and I'm 20 forgetting the name of the firm.</p> <p>21 A. Landa & Altscher.</p> <p>22 Q. Landa & Altscher. Did they remain the 23 accountants throughout and after the closing?</p> <p>24 A. To my knowledge, yes.</p>	<p style="text-align: right;">Page 104</p> <p>1 Q. Who actually prepared the text of this 2 e-mail?</p> <p>3 A. Mary Anne Tyler.</p> <p>4 Q. Can you tell me what this e-mail refers to?</p> <p>5 What is the \$869,055 Terry Nolan is being directed 6 to release?</p> <p>7 A. That's the recoupment to the Commonwealth.</p> <p>8 Q. And can you explain to me why Terry Nolan is 9 being instructed to release these funds to Cranberry 10 Point Nursing Home?</p> <p>11 A. Yes. As I tried to explain to you, I think 12 it was a very difficult thing, you might think this 13 is odd, but to pay the Commonwealth the money they 14 were owed, and I think we ultimately worked out an 15 arrangement after talking to a whole bunch of people 16 over there. As you can see, it took over a month 17 from the closing. The original intention at the 18 closing was simply to either wire the funds or to 19 get funds over there from Fidelity, but they 20 wouldn't accept a wire, because for some reason it 21 would go into the general fund and not into the 22 Medicaid funds if it was wired, so ultimately we had 23 to find somebody over there that would agree to 24 accept a check at some point, and I believe the</p>
<p style="text-align: right;">Page 103</p> <p>1 Q. After the conversation that you had with 2 Madeline Kauffman the morning following the closing, 3 from that time until today, have you had any other 4 conversations with either Ms. Kauffman, or Mr. 5 Dunham, or anyone affiliated with Key Bank?</p> <p>6 A. No.</p> <p>7 Q. And after Ms. Kauffman called you did you 8 have any conversations with anyone at CBW?</p> <p>9 A. No.</p> <p>10 Q. From the day of the closing to your sitting 11 here today, have you had any conversations with any 12 of the attorneys at Goodwin Procter about CBW's fee 13 and whether or not it had been paid?</p> <p>14 A. No.</p> <p>15 (Document marked as Exhibit 67 for 16 identification.)</p> <p>17 Q. Have you had a chance to look at Exhibit 67?</p> <p>18 A. Yes.</p> <p>19 Q. Now this e-mail, it say at the top it's from 20 Mary Anne Tyler, but then your signature block 21 appears underneath. Is that something you would 22 typically do, have Mary Anne Tyler send e-mails for 23 you?</p> <p>24 A. Sometimes, yes.</p>	<p style="text-align: right;">Page 105</p> <p>1 arrangement -- Frank Barker made an arrangement 2 with -- through, I guess, Landa's office that 3 somebody would accept a check if they walked it 4 over there, and it was on Cranberry's heading, so I 5 think Andy and I sent a release to Nolan telling him 6 to give the money to Cranberry, and Cranberry went 7 over and paid the bill. They had made arrangements 8 to pay it.</p> <p>9 Q. So this e-mail is dated November 2 of 2004?</p> <p>10 A. Looks like it, yes. It took a while to get 11 it done. It was amazing.</p> <p>12 Q. I think you had testified earlier that the 13 money was going to be given at the closing to 14 Goodwin, Procter & Hoar, and Goodwin, Procter & Hoar 15 was to give the funds to the Commonwealth?</p> <p>16 A. That's right. That was the original 17 intention.</p> <p>18 Q. And so was there a check written to Goodwin, 19 Procter & Hoar at the closing in this amount?</p> <p>20 A. I think it went -- well, actually, I don't 21 know. I have to look at a settlement statement. I 22 think it went to Goodwin. Where is the memo? I 23 don't see it in there, but I think it was supposed 24 to go to -- Goodwin was supposed to take it over,</p>

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<p style="text-align: right;">Page 106</p> <p>1 then that didn't work out. We made some calls over, 2 I guess, to Medicaid, and they wouldn't take it, so 3 I think it was deposited with Nolan, as I think back 4 on it, and it was to be released from Nolan to 5 Sucoff. I think there is a memo in these documents 6 you have looked at this morning indicating we 7 weren't to have any say about what happens to it, it 8 was to go to Sucoff to take over when he made 9 arrangements to do it, but then apparently Medicaid 10 wanted our guys to bring it in or something.</p> <p>11 Q. So as of the time of this November 2, 2004 12 e-mail, the money had been sitting with Fidelity 13 since the closing?</p> <p>14 A. I think that's right.</p> <p>15 Q. And it's your testimony what happened is, 16 per this e-mail, is that Fidelity then cut a check 17 to Cranberry Nursing Home for this amount; is that 18 right?</p> <p>19 A. I think they agreed that Frank Barker would 20 take it in and pay it. That was the arrangements 21 made with Medicaid, and to my knowledge it was paid, 22 because there has been no claim against Epoch.</p> <p>23 ATTY. HIGGINS: Let mark that as the 24 next exhibit.</p>	<p style="text-align: right;">Page 108</p> <p>1 correspondence?</p> <p>2 A. This document, yes, I would say.</p> <p>3 ATTY. HIGGINS: What was the basis for 4 the objection to producing documents responsive to 5 the subpoena? I don't know if I should direct this 6 to Mr. McCullough or his attorney. I think you said 7 the witness made an objection.</p> <p>8 ATTY. GORDON: Well, I, as his counsel, 9 made an objection on his behalf.</p> <p>10 ATTY. HIGGINS: Could you just state for 11 the record, because your letter does not so state, 12 what the basis of the objection is?</p> <p>13 ATTY. GORDON: No.</p> <p>14 ATTY. HIGGINS: No?</p> <p>15 ATTY. GORDON: No.</p> <p>16 ATTY. HIGGINS: You are refusing to 17 tell me why you objected to producing documents 18 responsive to the subpoena.</p> <p>19 ATTY. GORDON: I'm refusing to answer 20 questions at this deposition. Mr. McCullough is the 21 deponent.</p> <p>22 Q. Mr. McCullough, you see that this -- if you 23 look at the document that is attached to this 24 November 3 letter.</p>
<p style="text-align: right;">Page 107</p> <p>1 (Document marked as Exhibit 68 2 for identification.)</p> <p>3 Q. Mr. McCullough, I'm handing you what has 4 been marked as Exhibit 68. This appears to be a 5 letter dated November 3, 2004, on your letterhead, 6 signed by both you and Andy Sucoff; is that right?</p> <p>7 A. Yes.</p> <p>8 Q. Is there any reason why, in responding to 9 your deposition subpoena, we didn't get this letter?</p> <p>10 A. I don't know that you didn't get it.</p> <p>11 Q. This obviously would have been a document in 12 your files, correct?</p> <p>13 ATTY. GORDON: There were no documents 14 produce in response to the deposition subpoena.</p> <p>15 ATTY. HIGGINS: I understand that, and 16 my question is why not, why didn't we get this in 17 response to the subpoena.</p> <p>18 ATTY. GORDON: Because there was an 19 objection from the witness to producing documents.</p> <p>20 Q. Mr. McCullough, this document that we have 21 just marked as Exhibit 68, is there a copy of this 22 document in your files?</p> <p>23 A. I would think there probably is.</p> <p>24 Q. Is it your practice to maintain copies of</p>	<p style="text-align: right;">Page 109</p> <p>1 A. Yes.</p> <p>2 Q. Now this check, which is in the amount of 3 \$869,055, you see that, it is a Fidelity check, do 4 you see that, and it's got -- somebody has written 5 canceled across it; do you see that?</p> <p>6 A. It says Fidelity National Title Insurance 7 Company?</p> <p>8 Q. Yes.</p> <p>9 A. Yes.</p> <p>10 Q. And somebody has written canceled across it?</p> <p>11 A. Yes.</p> <p>12 Q. Is that your handwriting?</p> <p>13 A. No.</p> <p>14 Q. You sent this letter to Mr. Nolan, and you 15 requested that Mr. Nolan release a check in the 16 amount of \$869,055 made payable to Cranberry Point 17 Nursing Home, Inc., correct?</p> <p>18 A. This is a joint letter from Sucoff and 19 myself.</p> <p>20 Q. Correct.</p> <p>21 A. That's correct. I have no idea looking at 22 this check who it is made out to. It says -- oh, it 23 says pay to the Commonwealth of Mass.</p> <p>24 Q. Correct.</p>

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<p style="text-align: right;">Page 110</p> <p>1 (Document marked as Exhibit 69 2 for identification.) 3 Q. Mr. McCullough, I'm handing you Exhibit 69. 4 The first page of that exhibit is a letter dated 5 November 4, 2004 to Mary Anne Tyler of your office; 6 do you see that? 7 A. Yes. 8 Q. The letter is from a woman named Jacquelyn 9 Byrne at Fidelity National Title Insurance Company 10 enclosing a check made payable to Cranberry Point 11 Nursing Home in the amount of \$869,055, correct? 12 A. Yes. 13 Q. Is this also a letter a copy of which is in 14 your files? 15 A. I assume it would be, but I don't -- I mean, 16 I don't have a memory of it. 17 Q. This letter is dated November 4, 2004. Have 18 you ever had -- strike that. From that date to the 19 present have you had conversations with anyone at 20 the Commonwealth of Massachusetts about this 21 obligation, whether it's been paid, whether it's not 22 been paid? 23 A. No. 24 Q. Mr. McCullough, are you familiar with an</p>	<p style="text-align: right;">Page 112</p> <p>1 that were satisfactory to Sucoff, and Goodwin 2 Procter, and Epoch in that regard, and they 3 obviously had had communications with the Medicaid 4 office also to determine the correct pathway to pay 5 this bill, and it's my understanding it was paid, 6 otherwise Epoch would be screaming about it now, 7 because they would have had their checks reduced. 8 Q. Do you have any understanding as to whether 9 the current -- as to the current status of the 10 ownership of the shares in The Pointe Group, Inc. 11 A. The Pointe Group Inc.; not off the top of my 12 head I don't, no. 13 Q. How about any of the healthcare -- remaining 14 healthcare entities that the Freid family is 15 involved with; do you know whether the shares, in 16 either the companies that own those entities, or the 17 operating companies, whether those shares are still 18 held by Georgia Freid and Mark Tobin? 19 A. I believe that's the case. 20 ATTY. HIGGINS: I don't think I have any 21 other questions.</p>
<p style="text-align: right;">Page 111</p> <p>1 entity called Freid and Tobin Venture Partners? 2 A. No. 3 Q. To the best of your knowledge did any monies 4 from any of the escrow funds that were established 5 at the closing go back to any member of the Freid 6 family? 7 A. Which escrows are you talking about? 8 Q. Any of the escrows that were established at 9 the closing. 10 A. The Mellon escrows? 11 Q. Or the Fidelity escrows. 12 A. No, no monies, to my knowledge, went back to 13 the sellers, or the Freids. 14 Q. And it's your understanding that the check 15 that is made payable to Cranberry Point, the intent 16 of that check was it was going to be deposited into 17 that -- into a bank account, Cranberry Point bank 18 account, and then a check was going to be written 19 out to the Commonwealth of Massachusetts and then 20 delivered to them? 21 A. I don't know if this check ultimately was 22 endorsed over to the Commonwealth. Frank Barker had 23 made arrangements with the Medicaid Division to 24 obtain this check, and satisfactory arrangements,</p>	<p style="text-align: right;">Page 113</p> <p>1 Worcester, and I represent Key Corporate Capital in 2 this matter. For simplicity sake I'm just going to 3 refer to that entity as Key, if that's okay with 4 you. 5 A. Mm-mm. 6 Q. Other than Madeline Kauffman did you have 7 interactions with anyone else from Key related to 8 the sale of the combined operations? 9 A. I don't know what you mean by interactions. 10 Q. Conversations. 11 A. I had conversations with Steve Dunham. I 12 met him a number of times. 13 Q. When did you first meet Mr. Dunham? 14 A. I probably met him at the Goodwin Procter 15 meeting. I think it was sometime in July 2004. 16 Q. That was the first time you had met Mr. 17 Dunham? 18 A. I believe that's correct. 19 Q. Had you had conversation with him prior to 20 that? 21 A. He may have been on a telephone conversation 22 conference call at one time when the transaction was 23 starting. 24 Q. Would that have been one of the conference</p>

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<p style="text-align: right;">Page 114</p> <p>1 calls that you testified to earlier? I believe you 2 testified to a due diligence call that had taken 3 place. 4 A. There were a couple of due diligence calls, 5 and I believe there was a conference call that Steve 6 Dunham was involved in at one time. 7 Q. Do you recall anything about the conference 8 call where Mr. Dunham was a participant? 9 A. Do I recall anything about it; what he said? 10 Q. What he said. 11 A. Not really. 12 Q. And how about at the July 2004 meeting at 13 Goodwin and Procter; do you remember anything that 14 Mr. Dunham said then? 15 A. No, I don't. My conversations with him were 16 just social conversations, just introductory 17 conversations. 18 Q. After the July 24 meeting at Goodwin 19 Procter, did you have any other conversations with 20 Mr. Dunham? 21 A. Not that I recall. I think my primary 22 contact with Key was Madeline Kauffman. 23 Q. Other than Mr. Dunham and Ms. Kauffman did 24 you have any interactions with anyone else from Key</p>	<p style="text-align: right;">Page 116</p> <p>1 A. That's what my understanding is. 2 Q. Is it your understanding that Key was owed 3 in excess of the 29 million that they received from 4 the closing? 5 A. If they agreed to reduction, were they owed 6 it, is that the question? 7 Q. I wasn't actually trying to be that tricky. 8 Prior to any reduction, do you have an understanding 9 of how much Key was owed? 10 A. I don't know exactly the number, but it's my 11 understanding it was in excess of the 29 million. 12 Q. Do you have a sense of how much in excess it 13 was; was it 40 million, was it 30 million, just to 14 try to get a ball bark? 15 A. I really don't. It depends on how you 16 calculate interest. I don't know. I'm sure it's 17 accessible in the records. 18 Q. Were you a part of any of the conversations 19 as to how the \$29 million number and change was 20 reached that was going to be paid to Key out of the 21 closing proceeds? 22 A. No. 23 Q. Do you know who was a party to those 24 conversations?</p>
<p style="text-align: right;">Page 115</p> <p>1 related to the sale of the combined operations? 2 A. Not that I can recall. 3 Q. Did either Jerry or Barry Freid ever relay 4 to you conversations that they had had with Mr. 5 Dunham related to the sale of the combined 6 operations? 7 A. Are you asking me for conversation with my 8 client? 9 Q. I'm just asking if they had ever mentioned 10 to you that they had spoken to him about the sale in 11 a conversation you weren't present for. 12 ATTY. GORDON: You can answer whether 13 or not that took place. 14 A. I don't recall. 15 Q. Do you have an understanding of what the 16 outstanding mortgages were on the combined 17 operations owed to Key? 18 A. Prior to the closing you mean, unadjusted? 19 Q. Unadjusted. 20 A. Unadjusted mortgages. No. It was in excess 21 of the sale price, is my understanding. 22 Q. We have seen a bunch of closing statements 23 that show that Key received somewhere around \$29 24 million from the closing.</p>	<p style="text-align: right;">Page 117</p> <p>1 A. I think Mr. Gordon was working with the 2 bank. 3 Q. Were you aware of any attempts or thoughts 4 by Key to foreclose on the combined operations? 5 A. Was I aware of any thoughts by Key; no. 6 Q. Or were you aware there was a concern that 7 Key may foreclose on the combined operations? 8 ATTY. GORDON: Concern by his clients? 9 ATTY. WORCESTER: Or did Key speak to 10 him. I'm not looking for a conversation from his 11 clients; I'm just curious if he had knowledge. 12 A. It was certainly impressed on me, I think, 13 by Madeline Kaufmann that Key wanted to close -- 14 Q. And based on that -- 15 A. -- in several conversations, yes. 16 Q. How did Ms. Kauffman impress that upon you? 17 A. She said that the bank wanted their money. 18 Q. What did you take from that? 19 A. Well, that we should do the best we can to 20 get this matter to closing and succeed in getting 21 the bank some money. 22 Q. Was it your understanding that if the 23 closing didn't occur that the bank may take action? 24 A. I don't know what the bank would have done.</p>

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<p style="text-align: right;">Page 118</p> <p>1 I know there were several loan extension agreements 2 that were very expensive that my clients entered 3 into with the bank; whether that would have happened 4 again, I have no idea whether they would have taken 5 any action, I don't know, but they certainly wanted 6 to see the closing on 9/30 succeed, and, in fact, if 7 you look at the documents you will see I think there 8 was an extension until 9/15, and we had persuaded 9 the bank to hang in there until the end of the month 10 to close.</p> <p>11 Q. Do you recall why the transaction didn't 12 close on 9/15, it took until 9/30?</p> <p>13 A. It was a very complex transaction, a lot of 14 documentation, a lot of due diligence, a lot of 15 investigation. It was very -- it was 3 facilities, 16 so it was quite cumbersome and a lot of paper.</p> <p>17 Q. In looking at the closing -- the drafts of 18 the various closing statements that you have seen 19 today, I have not seen anywhere the number, the 20 amount that was going to be paid to Key, changed 21 from the \$29,425,000, and feel free to go back 22 through the 5 or 6 that we have looked at today. Do 23 you have a memory of that number changing from the 24 first draft of the closing statement to the actual</p>	<p style="text-align: right;">Page 120</p> <p>1 A. Did I give them a copy of the settlement 2 statement; is that what you are asking?</p> <p>3 Q. No.</p> <p>4 A. Okay. Sorry.</p> <p>5 Q. That's okay. It wasn't a clear question. 6 Exhibit 58, which we have looked at earlier, was an 7 e-mail from you to Andy Sucoff stating that you had 8 forwarded to your client a revised closing statement 9 and they have made provisions for the amount due 10 from sellers.</p> <p>11 ATTY. GORDON: I think that's actually 12 Exhibit 59.</p> <p>13 ATTY. WORCESTER: Oh, is it 59?</p> <p>14 ATTY. GORDON: I have 58 as one of the 15 closing statement drafts.</p> <p>16 THE WITNESS: It is, yes.</p> <p>17 A. Yes? The question is?</p> <p>18 Q. So the sellers were aware, at least the 19 night before the closing, that there was a 20 deficiency from the closing proceeds?</p> <p>21 ATTY. GORDON: Is that a question?</p> <p>22 ATTY. WORCESTER: Yes.</p> <p>23 ATTY. GORDON: I object to the form of 24 the question, and that's not the way the witness</p>
<p style="text-align: right;">Page 119</p> <p>1 closing that took place on 9/30?</p> <p>2 A. From the first draft of the closing 3 statements? I don't have a memory of that. I know 4 there was a change along the way, yes.</p> <p>5 Q. From 9/27, which I believe is the first 6 closing statement that we have looked at today, the 7 first draft, to 9/30, are you aware of any change in 8 the amount of money that Key was to obtain from the 9 closing proceeds?</p> <p>10 A. I'm not aware of it, no.</p> <p>11 Q. Were you aware of any discussions with Key 12 to reduce that number?</p> <p>13 A. I did not have conversations with Key to 14 reduce any numbers.</p> <p>15 Q. Are you aware of any conversations that took 16 place between anyone else and Key?</p> <p>17 A. Not in my presence, no.</p> <p>18 Q. I believe you testified to this earlier, 19 but I just want to make sure. On the day before 20 the closing on September 29, 2004, to the extent 21 that the sellers needed to bring money to the 22 closing, that was information that would have been 23 conveyed to them prior to the closing on September 24 30?</p>	<p style="text-align: right;">Page 121</p> <p>1 testified, and if you are asking him to testify as 2 to his clients' knowledge, I'm going to have to 3 instruct him not to so testify on the grounds of 4 privilege.</p> <p>5 Q. Let me ask the question again, because I'm 6 rather confident it's not calling for privileged 7 information. You forwarded, the night before the 8 closing, the revised closing statement to your 9 clients, correct?</p> <p>10 ATTY. GORDON: Is that a question?</p> <p>11 Q. Yes.</p> <p>12 A. I did send the closing statement to the 13 office. I don't know if all the participants and 14 the seller saw it, but I did send it over there, if 15 that's your question.</p> <p>16 Q. Is it your testimony that it's possible that 17 your clients came to the closing on 9/30 unaware 18 that they would receive no money from the closing 19 proceeds?</p> <p>20 A. (No response.)</p> <p>21 Q. Honestly, I'm not trying to ask a 22 complicated question.</p> <p>23 ATTY. GORDON: It's a very -- I don't 24 understand the question.</p>

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<p style="text-align: right;">Page 122</p> <p>1 THE WITNESS: I don't understand it as 2 well.</p> <p>3 ATTY. GORDON: If it's his testimony his 4 clients were unaware. Can you ask him a direct 5 question.</p> <p>6 ATTY. WORCESTER: I'm honestly trying 7 to.</p> <p>8 Q. Let's see. You forwarded to your client the 9 closing statement the night before the closing, 10 correct?</p> <p>11 ATTY. GORDON: No, he said he -- he just 12 testified that he sent it to the office.</p> <p>13 ATTY. WORCESTER: This e-mail says, I 14 forwarded to my client.</p> <p>15 ATTY. GORDON: Exhibit 59 is dated 16 September 29 at 8:31 p.m.</p> <p>17 ATTY. WORCESTER: Yes.</p> <p>18 A. So I probably sent it over quarter of nine, 19 you know. They may not have seen it, or somebody 20 saw it over there, I suppose, but I don't know if 21 all of them saw it.</p> <p>22 Q. If you were unaware if they saw it, what is 23 the basis for your statement to Mr. Sucoff that they 24 have made provisions for the amount due from the</p>	<p style="text-align: right;">Page 124</p> <p>1 I have instructed the witness not to answer it. 2 Q. You are going to follow your attorney's 3 instructions? 4 A. Yes. 5 Q. Mr. McCullough, are you aware of any comfort 6 letters that were provided by Key to Epoch regarding 7 the closing? 8 A. A comfort letter? How do you describe a 9 comfort letter? I don't know what you mean. 10 Q. I would probably defer to what you believe 11 it is, as you have much more experience in the area 12 of transactional work, but I was considering it to 13 be a letter stating to Epoch that Key would release 14 the mortgages, or any liens, that it held on the 15 combined operations if certain conditions were 16 met. 17 A. I think that I recall a request for that 18 from the Epoch Group, and did Key do that; I think 19 if they were asked to do it they probably did it. I 20 don't recall it offhand, but I don't know if it's 21 part of the closing binders. 22 Q. To the extent it was done, you were not 23 involved in the process? 24 A. Well, you are asking me if I have a memory</p>
<p style="text-align: right;">Page 123</p> <p>1 sellers? 2 A. I probably had a conversation -- well -- 3 ATTY. GORDON: Can you answer that 4 question without divulging communications with 5 clients?</p> <p>6 THE WITNESS: I can't. I can't. 7 ATTY. GORDON: Then I have to object to 8 the question on the grounds of privilege and 9 instruct the witness not to answer it.</p> <p>10 ATTY. WORCESTER: I just want to make 11 sure I understand the objection. You are objecting 12 on the basis of privilege, even though Mr. Sucoff is 13 being told in this e-mail that provisions have been 14 made?</p> <p>15 ATTY. GORDON: I'm objecting on the 16 ground of privilege, because the question requires 17 an answer that invades the privilege.</p> <p>18 ATTY. WORCESTER: So your objection is 19 that even as to facts Mr. McCullough cannot testify 20 if they were communicated between himself and his 21 clients?</p> <p>22 ATTY. GORDON: My objection is that 23 an answer to the question would require an invasion 24 of the attorney-client privilege, and on that basis</p>	<p style="text-align: right;">Page 125</p> <p>1 of it. Was I involved in asking them to get us a 2 letter; I don't recall it. Actually, I don't 3 recall. 4 Q. Did you inform CBW that they were not going 5 to be paid out of the closing proceeds after the 6 closing? 7 A. I did not talk to CBW. 8 Q. Other than the conversations that you had 9 with Ms. Kaufmann the night of the closing, are you 10 aware of any other communications with Key Bank that 11 day? 12 A. Between myself and Key Bank? 13 Q. Yes. 14 A. I did not talk to Key Bank any other time 15 that day. 16 Q. To your knowledge was Key Bank provided with 17 any of the draft closing statements that were 18 generated at Goodwin Procter that day? 19 A. No. 20 ATTY. WORCESTER: That's all I have. 21 ATTY. HIGGINS: I have no further 22 questions, except to reserve my rights to, as we 23 have already put on the record, to reask those 24 questions that Mr. McCullough has not answered on</p>

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<p style="text-align: right;">Page 126</p> <p>1 instructions of counsel if the court should so 2 order, and for that purpose I'm suspending today's 3 deposition. 4 (Whereupon, the record was closed at 5 1:02 p.m.)</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 128</p> <p>1 Commonwealth of Massachusetts 2 Suffolk, ss. 3 I, Carol A. Pagliaro, Registered Professional 4 Reporter and Notary Public in and for the 5 Commonwealth of Massachusetts, do hereby certify 6 that JOHN C. McCULLOUGH, the witness whose 7 deposition is hereinbefore set forth, was duly sworn 8 by me and that such deposition is a true record of 9 the testimony given by the witness to the best of my 10 skill and ability. 11 I further certify that I am neither related to, 12 nor employed by, any of the parties in or counsel to 13 this action, nor am I financially interested in the 14 outcome of this action. 15 In witness whereof, I have hereunto set my hand 16 and seal this 6th day of June, 2005.</p> <p>17</p> <p>18</p> <p>19</p> <hr/> <p>20 Carol A. Pagliaro, RMR 21 Notary Public 22 CSR No. 123293</p> <p>23 My commission expires 24 April 28, 2011</p>																											
<p style="text-align: right;">Page 127</p> <p>1 C E R T I F I C A T E</p> <p>2 I, JOHN C. McCULLOUGH, do hereby certify that I have 3 read the foregoing transcript of my testimony, and 4 further certify that said transcript is a true and 5 accurate record of said testimony (with the 6 exception of the following corrections listed 7 below):</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left; width: 10%;">Page</th> <th style="text-align: left; width: 10%;">Line</th> <th style="text-align: left;">Correction/Reason</th> </tr> </thead> <tbody> <tr><td>9</td><td>_____</td><td>_____</td></tr> <tr><td>10</td><td>_____</td><td>_____</td></tr> <tr><td>11</td><td>_____</td><td>_____</td></tr> <tr><td>12</td><td>_____</td><td>_____</td></tr> <tr><td>13</td><td>_____</td><td>_____</td></tr> <tr><td>14</td><td>_____</td><td>_____</td></tr> <tr><td>15</td><td>_____</td><td>_____</td></tr> <tr><td>16</td><td>_____</td><td>_____</td></tr> </tbody> </table> <p>17</p> <p>18</p> <p>19 Signed under the pains and penalties of perjury 20 this _____ day of _____, 2005.</p> <p>21</p> <p>22</p> <p>23 JOHN C. McCULLOUGH</p> <p>24</p>	Page	Line	Correction/Reason	9	_____	_____	10	_____	_____	11	_____	_____	12	_____	_____	13	_____	_____	14	_____	_____	15	_____	_____	16	_____	_____	
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33 (Pages 126 to 128)

